ROBERT LYON MOORE AND OTHERS, PLAINTIFFS, *v.* THE ATTORNEY-GENERAL FOR SAORSTÁT ÉIREANN, WILLIAM GOAN, AND OTHERS, DEFENDANTS.

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July 3 to 5, 10 to 12, 17 to 19, 24 to 26. Oct. 16 to 18, 23 to 25, 30, 31. Nov. 1.

1929.

Feb. 18.

Several fishery—Tidal and navigable waters—Claim to fishery disputed—Evidence sufficient to sustain claim—Ancient documents—Inquisitions—Crown grants—Presumptions of law—Magna Charta—Whether waters must have been "put in defence" by the Crown—The Brehon Laws—Landed Estates Court conveyance—Parliamentary title—Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (*No.* 1 *of* 1922), *Sch. I, Art.* 11.

The plaintiffs brought an action, claiming (1) a declaration that they were entitled to a several fishery for salmon and all other fish in the entire tidal portion of the River Erne, in the County of Donegal, from the falls of Asseroe at Ballyshannon to the high sea or bar of Ballyshannon and to the bed and soil underlying the said waters; (2) a declaration that, at the date of the coming into operation of the Constitution of the Irish Free State, they, or their predecessors in title, were entitled, under a valid and subsisting grant, to a several fishery as aforesaid, and that the same constituted a valid private interest at the said date within the meaning of Art. 11 of the said Constitution; and (3) a declaration that, prior to the coming into operation of the said Constitution, by virtue of a certain Landed Estates Court conveyance, the grantees therein named (being the predecessors in title of the plaintiffs) became and were indefeasibly entitled by statute to the said several fishery, and the bed and soil underlying the said waters, and that such title was preserved by the said Constitution, and was now vested in the plaintiffs. And they claimed an injunction restraining the defendants and all other persons from trespassing upon the said several fishery, fishing therein, or taking fish thereout; and from obstructing the plaintiffs, their servants, licensees, or agents in the exclusive use and enjoyment of the said several fishery.

The defendants were a number of fishermen (who, in 1925 for the first time, challenged the plaintiffs' title) and the Attorney-General of the Irish Free State, who was sued as representing the public and the State.

In their statement of claim the plaintiffs alleged that, from time whereof the memory of man was not to the contrary, the said portion of the river, and the sole and several right of fishing for salmon and all other fish therein, had been put "in defence"; and that, prior to the granting of the Letters Patent set out in the statement of claim, the sole and several right of fishing for salmon and all other fish in the said portion of the river had become vested in, and was part of the possessions of, the Kings and Queens of England as Lords of Ireland. The statement of claim then set out a large number of documents (the findings of certain inquisitions, certain letters patent, assurances, Acts of Parliament, deed poll, and leases) upon which the plaintiffs based their claim.

The defendants denied the validity of the documentary title relied on, and further contended that, by the provisions of Magna Charta, the Crown was prohibited from granting a several or sole and exclusive fishery in the *locus in quo* in case such was not existing in or before the year 1189, and any grant by the Crown contrary to the provisions aforesaid was null and void; that a several or sole and exclusive fishery in the *locus in quo* in or before the year 1189 did not in fact exist, and was not historically possible; and that the said documents of title and the historical evidence given showed that the claim to a several or sole and exclusive fishery in the *locus in quo* was modern in origin, and dated at the earliest from the times of Queen Elizabeth and King James I.

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Held that there was nothing in the terms of Chap. 16 of Magna Charta, or the writings of ancient lawyers, or the judgments in modern cases to support the proposition that, whether the several fishery was actually in the hands of the Crown at the time of the death of Henry II, or in the hands of an assignee or feudatory of the Crown, or even of an intruder, the original act of appropriation must have been effected by the Crown itself.

Dicta in *Malcomson* v. *O'Dea*, 10 H.L. Cas. 593, and *Neill* v. *Duke of Devonshire*, 8 A.C. 135, applied.

As regards the defence that a several fishery in the *locus in quo* in or before the year 1189 did not in fact exist and was not historically possible—assuming that this meant an allegation that the feudal system had not penetrated as far as Ballyshannon in 1189; that, therefore, the King could not have appropriated a several fishery there at that date; and that, as a consequence, the presumption of law that might be made from an ancient title and long-continued user was not historically possible:

Held that, since appropriation by anyone prior to 1189 was sufficient, the defendants must prove that no one ever appropriated a several fishery in the place previously to 1189, and, as they could produce no actual evidence as to this, this defence was unsustainable.

Held further that there was sufficient evidence of title and of actual enjoyment to enable the Court to presume that this fishery originated beyond the time of legal memory, and there was nothing in the evidence adduced on behalf of the defendants, or in any of the legal considerations advanced on their behalf, which was sufficient to displace the presumption of a lawful origin, or which would enable the Court to come to the conclusion that the fishery was of modern origin.

Accordingly, since, so far as the evidence went, no claim to this fishery had ever been made on behalf of the public until the year 1925, and the case made on behalf of the defendants was no more than what Lord O'Hagan in *Neill* v. *Duke of Devonshire*, 8 A.C. 135, called "plausible antiquarian speculation," whereas the plaintiffs had satisfied the Court that they and their predecessors in title had been in exclusive possession of the fishery for centuries, and that their title originated under circumstances that could not now be questioned, they were entitled to the relief they claimed.

TRIAL OF ACTION.

Prior to the institution of the present action, the plaintiffs had issued summonses against the defendants (other than the Attorney-General) for having entered into and upon the fishery, to which the present action related, for the purpose of taking or killing fish, contrary to 11 & 12 Vict. c. 92, sect. 41; but the District Justice, before whom the summonses came for hearing, held that he had no jurisdiction, as a question of title was involved. One of the plaintiffs then applied for, and obtained, a conditional order for a writ of *mandamus* directed to the District Justice to hear and determine the summonses, and the High Court made the conditional order absolute; but, on appeal, the Supreme Court (Kennedy C.J. and Murnaghan J.; FitzGibbon J. dissenting) reversed that decision, and discharged the conditional order. The case is reported [1927] I.R. 406.

The plaintiffs then instituted the present action, and applied for an interlocutory injunction, which Johnston J. refused on the 26th May, 1927, but, on appeal, the Supreme Court, on the 27th June, 1927, reversed the decision of Johnston J., and granted the interlocutory injunction. The case is reported [1927] I.R. 569.

The plaintiffs' statement of claim was as follows:—

"1. The plaintiffs claim to be entitled to a several fishery for salmon and all other fish in the entire tidal portion of the River Erne, in the County of Donegal, from the falls of Asseroe at Ballyshannon to the high sea or bar of Ballyshannon, and to the bed and soil underlying the said waters.

"2. From time whereof the memory of man is not to the contrary, the said portion of the said river, and the sole and several right of fishing for salmon and all other fish therein, had been put in defence.

"3. Prior to the granting of the letters patent hereinafter set out, the sole and several right of fishing for salmon and all other fish in the said portion of the said river had become vested in, and was part of the possessions of, the Kings and Queens of England as Lords of Ireland

"4. By an inquisition held at Asseroe, in the County of Donegal, on the 26th day of November, in the 31st year of the reign of Queen Elizabeth, it was found (*inter alia*) that all the religious house or monastery of St. Bernard, with lands, tenements, tithes, and obventions, with the appurtenances belonged to Queen Elizabeth by right of her Crown; and that ten weirs for fishing and taking of eels in or on the water called 'le Erne' belonged to the said abbey; and that the abbot and convent had, in right of the abbey aforesaid, liberty for two fishers to take salmon in the water or river called the Erne, which runs from Asseroe, near Ballyshannon, and the second draught of all fish at Asseroe when they begin to fish, and liberty for one boat to fish from the island to the main sea for salmon or other fish; and the jurors said that all the aforesaid belonged to the Queen in right of her Crown.

"5. By indenture of lease, dated the 14th day of October, in the first year of his reign, King James the First demised to one John Binglie (*inter alia*) all that the fishings and taking of fishes of the lakes, stangs, rivers and streams called Loughearne, as well as eels and of all other fishes there being. And also all that the fishing and taking of salmon and herrings, and all other fishes in the ports, creeks, bays, or streams of Ballyshannon, Bondroise, with all other places, bays and ports, havens and creeks next adjoining in which fishes were accustomed to be taken, parcel of the King's Majesty's ancient inheritance, lying and being in the County of Donegal, in the Province of Ulster, to hold the same to the said lessee for 21 years, subject to the rent thereby reserved.

"6. By an inquisition held at Lifford, in the County of Donegal, on the 21st day of March, in the eighteenth year of the reign of the said King James the First, it was found (*inter alia*) that there was a Royal fishing in the sea below Ballyshannon, called the Salmon Leap of Ballyshannon, within the said county, where it doth ebb and flow, and is navigable with ships,

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barques, lighters, and boats, and that the same was in the possession of Henry, Lord ffolliott, or his assigns; and that the said Lord ffolliott hath taken up the rents and profits thereof for the space of these fifteen years last past.

"7. By letters patent under the Great Seal, bearing date the 9th day of April, in the twentieth year of the reign of His Majesty King James the First, and duly enrolled in the Chancery Rolls of Ireland, his said Majesty granted and released unto Henry ffolliott, Knight, Lord ffolliott, Baron of Ballyshannon, his heirs and assigns for ever (*inter alia*), the entire lately dissolved abbey, monastery or religious house, then lately called the Abbey or House of Monks of the Order of St. Bernard of Ashroe, otherwise Asheroth (being the monastery referred to in paragraph 4 hereof), with all and singular its appurtenances, in the County of Donegal; and also the entire site, circuit, ambit and precinct of the same abbey, monastery or religious house, and all the lands, tenements and hereditaments of the same; and also the lands, territories and tithes therein mentioned; and also certain weirs therein mentioned for taking eels in the River Erne between Lough Erne and the Castle of Ballyshannon, and the entire fishery of the said weirs; and also liberty for two fishermen to fish with loops for taking salmon upon the salmon leap near the Castle of Ballyshannon and between the said castle and the high sea, and liberty for two fishermen on the River Erne for taking salmon, and the second draught of all fish at Asseroe when the season commences, and the fishing of one boat to take salmon or other kinds of fish from the island and salmon leap to the great ocean in or near the bay or pale of Ballyshannon; and also the entire creek, bay or river of Ballyshannon, namely, from the high sea as far as the bank or fall of water commonly called the salmon leap, otherwise the pale of Asheroe, near the Castle of Ballyshannon; and also the aforesaid bank or (saltee salmon) in English the salmon leap, otherwise the pale of Asheroe, with its appurtenances; and also the lakes, weirs, islands and banks in or near the aforesaid creek, bay, and river aforesaid, and the soil and ground and water of the aforesaid creek, bay, lake or river, and all land covered with water there; and also the entire fishing and liberty of fishing to take salmon and all other kinds of fish whatever in or within the aforesaid creek, bay, or river aforesaid, and upon the banks aforesaid; and also the weirs and liberties of fishing and carrying fish therein specified; and also the whole and entire river and water of Erne aforesaid from the high sea as far as Lough Erne and the ground and soil of the same, with the appurtenances, lying and being in the Counties of Donegal and Fermanagh, or either of them, and all the towns and lands thereby granted and henceforth known as the Manor of Ballyshannon.

"8. The said Henry, Baron ffolliott, thereupon went into

possession of all the said manor or manors, lands, fishings, hereditaments, and premises, and continued in such possession until his death, to wit, in the year 1622.

"9. The said River Erne flows from Lough Erne to the sea. The tide ebbs and flows from the falls of Ballyshannon or Asseroe, otherwise Asheroe, to the bar of Ballyshannon or high sea, and the said River Erne is non-tidal from the said falls of Ballyshannon or Asseroe upwards. The falls of Ballyshannon or Asseroe are about three miles from the said bar. The falls of Belleek are about four miles above the falls of Ballyshannon or Asseroe; and Rosscor, where the river flows out of Lough Erne, is about two miles above Belleek. By the said letters patent the several and exclusive fishery for salmon and all other kinds of fish, from the high sea at the bar of Ballyshannon up to Lough Erne, in and throughout the tidal and non-tidal portions of the River Erne, passed to the said Henry, Baron ffolliott, in fee-simple.

"10. By letters patent under the Great Seal, bearing date the 30th day of August, in the fifteenth year of the reign of His Majesty King Charles the First, and duly enrolled in the Chancery Rolls in Ireland, the said Manor of Ballyshannon, and all and singular the lands, towns, territories, fishings, hereditaments, and premises granted by the said hereinbefore stated letters patent of King James the First, were confirmed to Thomas, Baron ffolliott, the second Baron ffolliott, and son of the said Henry, Baron ffolliott, in fee-simple.

"11. By certain indentures, dated respectively the 30th and 31st days of July, 1718, the 29th and 30th days of December, 1719, and the 29th and 30th days of April, 1720, and by virtue of a certain Act of the Parliament of Ireland, passed in the sixth year of the reign of his late Majesty King George the First, all and singular the said manors, lands, fishings, hereditaments, and premises comprised in and granted by the said letters patent, and of which the said Thomas, Baron ffolliott, was so seized as aforesaid, were assured by the successors in title of the said Thomas, Baron ffolliott, in consideration of the sum of £48,000, to William Connolly, in fee-simple.

"12. All the estate and interest of the said William Connolly in the said manors, lands, fishings, hereditaments, and premises afterwards became vested in the Right Honourable Thomas Connolly, who entered into and continued in exclusive possession thereof to the date of his death, and by his last will, bearing date the 27th day of May, 1799, the said Thomas Connolly devised (*inter alia*) all the said manors, lands, fishings, hereditaments, and premises to the trustees therein named, upon trust to raise, if necessary, certain moneys for payment of his debts and legacies, and subject thereto, to the use of testator's wife and her assigns during her life, and after her decease to the use of Edward Pakenham during his life, and after his decease

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to the use of the first and other sons of the said Edward Pakenham in tail male, with power to the said trustees and the survivors and survivor of them to make leases in possession for three lives of thirty-one years; and the said testator thereby declared that the said Edward Pakenham and his issue should, on coming into possession of the said property, assume and take the name and arms of Connolly.

"13. The widow of the said Thomas Connolly survived him, and died in or about the year 1821. On her death the said Edward Pakenham went into possession of the said manors, lands, fishings, hereditaments, and premises, and assumed and took the name and arms of Connolly.

"The said Edward Pakenham Connolly died in or about the year 1848, and was succeeded in the enjoyment of the said manors, lands, fishings, hereditaments, and premises by his eldest son, the late Thomas Connolly, who continued in such possession as aforesaid until the sale in the Landed Estates Court hereinafter mentioned.

"14. By an indenture of lease, dated the 17th day of March, 1819, the surviving trustees of the will of the said Right Honourable Thomas Connolly, under the powers so vested in them as aforesaid, demised unto one Simon Shiel all that and those the salmon fishery or fishery for salmon by nets, loops, weirs, or otherwise howsoever, from the bar of Ballyshannon, in the County of Donegal, in and through the whole extent of the River Erne, and the waters thereof, and the other waters and premises therein mentioned, and also the eel fisheries therein mentioned: to hold the same from the first day of May then last past for the two lives therein mentioned, or a concurrent term of 24 years, subject to the yearly rent of £1,200.

"15. The said Simon Shiel went into possession of all the said fisheries and premises so demised by the said lease, and so continued until his death, when his interest under the said lease vested in one Alicia Shiel. By an indenture of lease, dated the 25th day of April, 1860, the said Thomas Connolly, in whom the said estates were then vested, demised unto the said Alicia Shiel all that and those the fishery and fisheries and liberty and right of fishing for and taking herrings and all other kinds of fish whatsoever as therein specified from the high sea in and through the whole extent of the River Erne and the waters thereof, saving and excepting the said salmon and eel fisheries so as aforesaid demised by the said lease of 1819: to hold the same from the first day of November then last past for the surviving life in the said lease of 17th March, 1819, subject to the yearly rent of £10.

"16. The said Simon Shiel and Alicia Shiel, during the currency of the said leases respectively, enjoyed as such lessees the entire and exclusive fishery and fisheries thereby respectively demised. They gave licences to fish, and prosecuted as trespassers persons who fished without licences.

"17. In the year 1867 the said fisheries were set up for sale in the Landed Estates Court, in the matter of the estate of the said Thomas Connolly, subject to the said leases of 1819 and 1860; and by deed poll, dated the 11th day of March, 1869, under the hand of William Cary Dobbs, one of the Judges of the said Court, and under the seal of the said Court, the said William Cary Dobbs, under the authority of the Act 21 & 22 Vict. cap. 72, and in consideration of the sum of £45,250, duly conveyed to Samuel Maxwell Alexander, John Alexander, Robert Lyon Moore the elder, Samuel Maxwell Moore, and Patience Munn, all since deceased—firstly, all that and those the salmon fishery or fishery for salmon by nets, loops, weirs, or otherwise howsoever, from the bar of Ballyshannon, in the County of Donegal, in and through the whole extent of the River Erne and the waters thereof, and the river commonly called the Abbey River, near Ballyshannon aforesaid, and the waters thereof, and all other rivers, waters, and watercourses having communication with the said Rivers Erne and Abbey, where salmon is known to breed and cast spawn; and the small island known by the name of the Salmon Island at Ballyshannon aforesaid, together with all buildings and houses thereon; and the boathouse at the opposite shore, with liberty for a convenient road to the said boathouse through Mullinashee, and the small fish-house near the fall of Ballyshannon aforesaid, and the ground reserved for drying the nets, lying between the road leading from Ballyshannon aforesaid to the seashore, and the pool, containing by estimation one acre, plantation measure, be the same more or less; and all and singular the salmon fishery, and liberty and right of taking salmon, of the said Thomas Connolly, in and upon the said Rivers Erne and Abbey, and in and upon all rivulets, creeks, and waters near or belonging thereto, in the Counties of Donegal, Fermanagh, and Cavan, or any or either of them, with liberty of making and erecting new weirs in all convenient parts of the said rivers for taking salmon; and also the eel fishery or fishery for eels at or near the town of Ballyshannon, and all the royalties and right and liberty of taking eels of the said Thomas Connolly at or near the town of Ballyshannon aforesaid, with all and singular the rights, members and appurtenances to the said salmon and eel fishery belonging or appertaining, with liberty of making and erecting new weirs in all convenient parts of the said eel fishery, situate in the Counties of Donegal, Fermanagh, and Cavan. And also, secondly, the fishery and fisheries and liberty and right of fishing for and taking herrings and all other kinds of fish whatsoever, by nets, loops, weirs, or otherwise howsoever, of the said Thomas Connolly in or within the entire creek, bay, harbour, channel, and river of Ballyshannon, in the County of Donegal, from the high sea in and through the whole extent of the River Erne and the waters thereof, and the river commonly called

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the Abbey River, near Ballyshannon aforesaid, and the waters thereof, and all other rivers and waters having communication with the said Rivers Erne and Abbey, and all the several fishery of the said Thomas Connolly in the said waters and every part thereof, together with all ways, waters, watercourses, rights, members, privileges, and appurtenances to the said fisheries and premises belonging or appertaining, situate in the Counties of Donegal, Fermanagh, and Cavan. And also, thirdly, the salmon fishery or fishery for salmon by loops or otherwise howsoever, in or near the fall of Belleek, in the Counties of Donegal and Fermanagh, or either of them, and all and singular the royalties, salmon fishery, and liberty and right of taking salmon, of John Colpoys Bloomfield and William Hamilton Maffett, as receiver over his estates, and of the said Thomas Connolly as their grantee, in or upon the River Erne and in and upon all rivulets, creeks, or waters near or belonging thereto, in the Counties of Donegal, Fermanagh, and Cavan, or any or either of them, together with all ways, waters, watercourses, rights, members, privileges, and appurtenances to the said salmon fishery belonging or in anywise appertaining, situate in the Baronies of Tirhugh, Lurg and Magherabuoy and counties aforesaid, excepting the eel fishery and eel weir commonly called Carrydermott, lying before or near the said salmon fishery of Belleek, on the borders of the lands of Corlea, between the Counties of Donegal and Fermanagh, and full and free liberty of angling and fishing with a rod, line and hook in all or any of the waters mentioned in the conveyance next hereinafter referred to, in the same manner as they were excepted out of a former conveyance of the said last-mentioned premises, made by an indenture, dated the 25th day of January, 1851, and made between Major John Colpoys Bloomfield and William Hamilton Maffett, as receiver over his estates, of the first part, and Thomas Connolly, Esq., M.P., the owner in the said matter, of the second part, being a conveyance under the Renewable Leasehold Conversion Act, in lieu of a certain lease for lives renewable for ever: to hold the said premises unto the said grantees, their heirs and assigns for ever as tenants in common, and not as joint tenants, subject as to the said last granted fishery, to a perpetual fee-farm rent of £18 9s. 3d. therein mentioned, and to the leases and tenancies in the schedule thereto annexed mentioned.

"18. The said tenancies mentioned in the said schedule were the two leases of 17th March, 1819, and 25th April, 1860, hereinbefore mentioned; the said leases had expired by the death of Sir Richard Pakenham, the last surviving life therein, in or about the month of October, 1868, previous to the execution of the said deed poll of the 11th day of March, 1869.

"19. The said grantees under the said deed poll thereupon went into possession of all and singular the premises thereby

granted, and the said grantees and their respective successors in title under the said deed poll down to the plaintiffs have been from thence to the present time in exclusive possession and occupation of the said fisheries and premises, and have from thence to the present time exercised the entire sole and exclusive right of taking salmon and all other kinds of fish from the bar of Ballyshannon to the falls of Asseroe, and the persons so entitled under the said deed poll have continually issued written and printed licences to fish in and through the said fishery, and no one was permitted to fish, and no one did fish, with rods or otherwise, in any part of the said river, from the bar of Ballyshannon to the falls of Asseroe, without such licence, save as hereinafter stated.

"20. In the year 1887 Richard Davis, Patrick Holland, Richard M'Dermott, and James Deveneey entered upon the said several fishery, and fished therein without such licence as aforesaid. The persons then entitled under the said deed poll, namely, Robert Lyon Moore the elder, Samuel Maxwell Moore, Jane Ritter, and John Edward Ritter and Elizabeth Jane Smith Ritter, his wife, instituted an action in the Chancery Division of the High Court of Justice in Ireland against the said Richard Davis, Patrick Holland, Richard M'Dermott, and James Deveneey, claiming an injunction to restrain the said parties and each of them from trespassing upon the said several fisheries of the said Robert John Lyon Moore the elder, Samuel Maxwell Moore, Jane Ritter, John Edward Ritter and Elizabeth Jane Smith Ritter, or any part thereof, and fishing therein and taking fish thereout, and upon the hearing of the said action the Master of the Rolls granted a perpetual injunction as claimed, with costs.

"21. All the estate and interest of the said Thomas, Baron ffolliott, Henry, Baron ffolliott, William Connolly, the Right Honourable Thomas Connolly, and Thomas Connolly in the said several fisheries and premises has come to and is now vested in the plaintiffs, and the plaintiffs are now, and were, at and prior to the time of the wrongful acts hereinafter complained of, the owners of, and in actual and exclusive possession and enjoyment of, the said several fisheries, being the fisheries comprised in the several inquisitions and letters patent hereinbefore set out.

"22. In the year 1922 the said fishery and the lands and premises belonging and appertaining thereto were occupied during a period of fifteen days, from the 5th day of June, 1922, to the 19th day of June, 1922, inclusive, by National troops, and the then owners, including the plaintiffs, applied for compensation for the loss sustained by them owing to such occupation, and a sum of £2,648 was awarded and paid to them by the Minister of Finance, under the provisions of the Indemnity Act, 1924, in respect of such loss.

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"23. On the 3rd day of June, 1925, the defendants, William Goan, Michael Mulhartagh, Hugh Gavigan, John Cleary, William Phillips, and William Morrow, wrongfully entered upon the said several fishery of the plaintiffs in the tidal waters of the said River Erne at Roberts' Hole, and fished with a boat and net. The plaintiffs immediately issued summonses against the said six defendants, and on the hearing of the same the District Justice held that a question of title was involved, and made no rule on the summonses. The plaintiffs instituted proceedings by way of mandamus, and obtained a conditional order, but the said order was discharged by order of the Supreme Court on appeal, on the 28th day of February, 1927, on the ground that the District Justice was correct in holding that a question of title was involved.

"24. On the 11th, 12th, and 13th days of May, 1927, the defendants (other than the Attorney-General of Saorstát Éireann) wrongfully entered upon the said several fishery of the plaintiffs in the said tidal waters, at various points between the said falls of Asseroe and the high sea, and fished therein with boats and nets, and caught and took salmon thereout, and carried away and converted to their own use large quantities of the plaintiffs' fish therein; and obstructed and interfered with the plaintiffs in the use and enjoyment of the said fishery; and the defendants (other than the Attorney-General of Saorstát Éireann) continued to commit the said wrongful acts until restrained therefrom by the interlocutory injunction granted in this action by order of the Supreme Court, dated the 27th day of June, 1927; and the plaintiffs have suffered damage by reason of the said trespass and taking of fish, and by reason of the said obstruction and interference.

"The plaintiffs' claim is for:—

"1. A declaration that the plaintiffs are entitled to and possessed of a several fishery for salmon and all other kinds of fish in the entire tidal portion of the River Erne, in the County of Donegal, from the falls of Asseroe at Ballyshannon to the high sea or bar of Ballyshannon, and the bed and soil underlying the said waters.

"2. A declaration that, at the date of the coming into operation of the Constitution of the Irish Free State, the plaintiffs, or their predecessors in title, were entitled under a valid and subsisting grant to a several fishery for salmon and all other kinds of fish in the entire tidal portion of the River Erne, in the County of Donegal from the falls of Asseroe at Ballyshannon to the high sea or bar of Ballyshannon, and the bed and soil underlying the said waters, and that the same constituted a valid private interest at the date aforesaid within the meaning of Article 11 of the Constitution of the Irish Free State.

"3. A declaration that, prior to the coming into operation of the Constitution of the Irish Free State, by virtue of the said Landed Estates Court Conveyance of the 11th day of March, 1869, the grantees therein named (being the predecessors in title of the plaintiffs) became and were indefeasibly entitled by statute to the said several fishery, and the bed and soil underlying the said waters, and that such title is expressly preserved by the said Constitution, and is now vested in the plaintiffs.

"4. An order that the plaintiffs be quieted in the possession of the said several fishery.

"5. A perpetual injunction restraining the defendants and all other persons from trespassing upon the said several fishery, fishing therein, or taking fish thereout; and from obstructing or interfering with the plaintiffs, their servants, licensees or agents, or any person or persons authorised by the plaintiffs in the exclusive use and enjoyment of the said several fishery.

"6. Damages for the said wrongful acts.

"7. All necessary accounts and inquiries.

"8. Such further and other relief as the Court may deem just.

"9. Costs.

"The Attorney-General for Saorstát Éireann is sued as representing the public and the State of Saorstát Éireann."

The defence of the Attorney-General was as follows:—

"1. The Attorney-General for Saorstát Éireann (hereinafter called 'the said defendant') denies that the tidal portion of the River Erne, in the County of Donegal, from the falls of Asseroe at Ballyshannon to the high sea or bar of Ballyshannon, or any part thereof, or the bed and soil underlying the said waters, or any part thereof, or the sole and several rights of fishing for salmon or any other fish in the said waters, or any part thereof, had been put in defence from time whereof the memory of man is not to the contrary, or at any time prior to the date of Magna Charta.

"2. The said defendant denies that the sole and several right of fishing for salmon or any other fish in the said portion of the said river, or any part thereof, had become vested in, or was part of the possessions of, the Kings and Queens of England prior to the granting of the letters patent referred to in paragraph 3 of the statement of claim or at any time.

"3. The said defendant has no knowledge of the averments of fact contained in paragraphs 4 to 21 of the statement of claim, and will refer on the hearing of this action to such documents or other evidence as may be adduced in support thereof.

"4. The said defendant will further submit that under the provisions of Article 11 of the Constitution the right of fishing for salmon and all other fish in the said portion of the said river belongs to the Irish Free State, subject to any trusts,

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grants, leases or concessions existing in respect thereof on the date of the coming into operation of the Constitution, or to any valid private interest therein, and that the title shown by the plaintiffs to the said right of fishery does not constitute such a trust, grant, lease, concession or valid private interest as aforesaid."

The amended defence of the defendants, other than the Attorney-General, was as follows:—

"1. The said defendants deny that the said portion of the said river in paragraphs 1 and 2 of the statement of claim mentioned was, or that any part thereof was, put in defence as alleged or at all.

"2. The said defendants deny that prior to the grant of letters patent, referred to in paragraph 3 of the statement of claim, the sole and several right of fishing for salmon or any other fish in the said portion of the said river had become vested in, or formed any part of, the said possessions of the Kings or Queens of England as alleged or at all.

"3. The said defendants deny the holding of the said inquisitions at Assaroe or at Lifford, as alleged in paragraphs 4 and 6 of the statement of claim or at all.

"4. Alternatively, the said defendants deny that by the said inquisitions the several findings set out in paragraphs 4 or 6 of the statement of claim, or any of them, were found by the said inquisitions as alleged or at all.

"5. The said defendants deny the execution and the contents of the said indenture of lease dated the 14th day of October, in the first year of the reign of King James I, as alleged in paragraph 5 of the statement of claim or at all.

"6. The defendants deny the execution and enrolment of the letters patent set out in paragraph 7 of the statement of claim.

"7. Alternatively, the said defendants deny the contents of the said letters patent as set out in paragraph 7 of the statement of claim; and the said defendants deny that the said Henry, Baron ffolliott, went into possession of the lands, manors, fishings, hereditaments or premises, or continued in such possession as alleged or at all. The said defendants further deny that the several or exclusive fishery for salmon and all other kinds of fish passed to, or vested in, the said Henry, Baron ffolliott, in fee-simple or at all.

"8. The said defendants deny the execution and enrolment of letters patent dated 30th day of August, in the fifteenth year of the reign of King Charles I; and the said defendants further deny the alleged or any confirmation to the second Baron ffolliott as alleged or at all.

"9. The said defendants deny each and every the several indentures and the alleged Act of Parliament of Ireland set out

in paragraph 11 of the statement of claim; and the said defendants deny that the alleged fishings, lands, hereditaments, and premises were assured to William Connolly as alleged or at all.

"10. The said defendants deny that all the estate and interest of the said William Connolly became vested in the Right Honourable Thomas Connolly; and the said defendants further deny that the said Thomas Connolly entered into, or was in exclusive possession of, the said fishings, lands, hereditaments, and the premises as alleged or at all. The said defendants further deny the execution and contents of the said will of the said Thomas Connolly, deceased.

"11. The said defendants deny that the said Edward Pakenham Connolly, or his son, Thomas Connolly, went into possession of the said fishings, manors, lands, hereditaments, and premises as alleged or at all.

"12. The said defendants deny the execution and contents of the indenture of lease dated 17th day of March, 1819, and 25th day of April, 1860; and the said defendants deny that the said Simon Shiel or Alicia Shiel went into or enjoyed an exclusive or any fishery or fisheries as alleged or at all, or gave licences to fish, or prosecuted as trespassers persons who fished without licences.

"13. The said defendants deny the execution and contents of the said deed poll, as set out in paragraph 17 of the statement of claim; and the said defendants deny that the grantees under the said deed poll went into exclusive or any possession or occupation of the said fisheries or premises mentioned therein, or that they have exercised the entire, sole, or exclusive right of taking salmon or any other kind of fish from the bar of Ballyshannon to the falls of Assaroe. The said defendants deny that no person fished with rods or otherwise in that part of the said river without the licence or licences referred to in paragraph 19 of the statement of claim.

"14. The said defendants are strangers to the several matters set out in paragraph 20 of the statement of claim, and do not admit the institution of the said proceedings for trespass. The said defendants deny the granting of the alleged perpetual injunction mentioned in paragraph 20 of the statement of claim.

"15. The said defendants deny that the estate and interest (if any, which he denied) of the said Thomas, Baron ffolliott, Henry, Baron ffolliott, William Connolly, the Right Honourable Thomas Connolly, or Thomas Connolly, or any of them, in the said fisheries or premises is now vested in the plaintiffs, and the said defendants further deny that the plaintiffs are or were in actual or exclusive possession or enjoyment of the said fisheries or premises or at all.

"16. The said defendants are strangers to the several facts and matters set out in paragraph 22 of the statement of claim, and do not admit same or any of them; and the said defendants

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submit, and will contend, that the several averments in said paragraph contained are irrelevant in this action.

"17. The several defendants mentioned in paragraph 23 of the statement of claim deny that they entered on the said fishery as alleged, or at all; and the defendants, other than the Attorney-General of Saorstát Éireann, deny that they or any of them entered on the said fisheries as alleged in paragraph 24 of the statement of claim or at all.

"18. The said defendants deny that the plaintiffs have suffered the alleged or any loss or damage.

"19. Alternatively the several defendants mentioned in paragraph 23 of the statement of claim, as to the said entry on the 3rd day of June, 1925, and all the defendants, other than the Attorney-General of Saorstát Éireann, as to the said entries on the 11th, 12th, and 13th days of May, 1927, say that they entered on the said waters as members of the public, and in pursuance of their rights as members of the public, fished the said waters; and the said defendants deny that the said Thomas, Baron ffolliott, Henry, Baron ffolliott, William Connolly, the Right Honourable Thomas Connolly, or Thomas Connolly were, or that any of them were, or that the plaintiffs are now, or were at any time, the owners of or entitled to a several fishery in that part of the River Erne from the falls of Assaroe at Ballyshannon, in the County of Donegal, to the high sea or bar of Ballyshannon, being the tidal portion of the said River Erne, or the owners of or entitled to the bed or soil underlying the said waters.

"20. The said defendants further, and in the alternative, say that the several letters patent, assurances, Acts of Parliament, deed poll, and leases set out in the statement of claim did not, and none of them did or do, confer a several fishery in the said tidal portion of the said river, and that said defendants submit and will contend that in so far as same or any of them purport to convey, assure, grant or lease a several fishery, they are illegal and void.

"21. The said defendants contend that, on the true construction of the documents of title in the statement of claim set forth, the plaintiffs have not in fact shown title to a several or sole and exclusive fishery in the *locus in quo*, viz., from the falls of Assaroe to the high sea; and, further, that by provisions of Magna Charta, the Crown was prohibited from granting a several or sole and exclusive fishery in the *locus in quo* in case such was not existing therein in or before the year 1189, and any grant by the Crown contrary to the provisions aforesaid is null and void; and, further, that a several or sole and exclusive fishery in the *locus in quo* in or before the year 1189 did not in fact exist, and is not historically possible; and the said documents of title and the historical evidence show that the claim to a several or sole and exclusive fishery in the *locus in quo* is

modern in origin, and dates at earliest from the times of Queen Elizabeth and King James the First.

"22. These defendants say that by the judgment of the House of Lords, delivered on the 6th day of April, 1883, in the appeal of *Mecredy and Others* versus *Alexander and Others* (1), the plaintiffs in the present action are estopped from saying that the grantees in the Landed Estates Court conveyance of the 11th March, 1869 (being the predecessors in title of the plaintiffs in this action), became and were indefeasibly entitled by statute to the several fishery and bed and soil underlying the waters as is claimed by the declaration prayed in paragraph 3 of the prayer for relief at foot of the statement of claim herein."

The plaintiffs in their reply to the amended defence of the defendants, other than the Attorney-General, joined issue with the said defendants.

During the hearing of the case liberty was given to the plaintiffs to amend their statement of claim and to the defendants to amend their defences, and accordingly the statement of claim and the defences were amended as follows:—

The statement of claim was amended by substituting for paragraph 10 thereof the following:—

"10. By letters patent under the Great Seal of Ireland, bearing date the 30th day of August, in the 15th year of the reign of His Majesty King Charles I, and duly enrolled in the Chancery Rolls of Ireland, the said Manor of Ballyshannon, and all and singular the lands, towns, territories, tenements, fishing and fishings, hereditaments and premises, granted by the said hereinbefore recited letters patent of King James the First, were granted and confirmed to Thomas, Baron ffolliott, the second Lord ffolliott, and son of the said Henry, Baron ffolliott, in fee-simple.

"10 A. Further, and in the alternative, the plaintiffs say that the said hereditaments and premises granted as aforesaid were plantation lands in the said counties of Donegal and Fermanagh, within the meaning of the statute 10 Charles I, Session 3, c. 3, and were passed by the said letters patent mentioned in paragraph 10 hereof upon the Commission of Grace bearing date at Canterbury, in the realm of England, the 1st day of September, in the 14th year of Charles I; and that, by virtue of sect. 1 of the said statute, the said letters patent operated to vest in the said Thomas, Baron ffolliott, an indefeasible estate in fee-simple in the said hereditaments and premises expressed to be thereby granted, good and valid as well against the King's Most Excellent Majesty, his heirs and successors, including the Irish Free State, as against all and every other person and persons whatsoever.

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"10 B. Further, and in the alternative, the plaintiffs say that the said hereditaments and premises so granted as aforesaid lay within the plantations mentioned in the statute 15 Charles I, c. 6, sect. 1, and were passed by the said letters patent mentioned in paragraph 10 hereof upon the Commission of Grace, bearing date at Canterbury, in the realm of England, the 1st day of September, in the 14th year of Charles I; and that, by virtue of sect. 1 of the said statute, the said letters patent were good, sufficient, effectual, and indefeasible to all intents, constructions and purposes, as well against His Majesty King Charles I, his heirs and successors, including the Irish Free State, as against all and every other person and persons whatsoever. And that, at the date of the said letters patent, His Majesty King Charles I was, by virtue of sect. 1 of the said statute 10 Charles I, Session 3, c. 3, and of sect. 2 of the said statute 15 Charles I, c. 6, absolutely and indefeasibly entitled to the said hereditaments expressed to be granted by the said letters patent in right of his Imperial Crown."

The defence of the defendants, other than the Attorney-General, was amended by substituting for paragraph 8 thereof the following:—

"8. The said defendants deny that the letters patent in the tenth paragraph of the amended statement of claim alleged were passed under the Great Seal of Ireland, or enrolled in the Chancery Rolls of Ireland, or that the several or sole and exclusive fishery in the *locus in quo*, which is the subject-matter in question in this action, was granted or confirmed to Thomas, Baron ffolliott, by the letters patent in fee-simple or at all.

"8 A. The said defendants deny that the said several or sole and exclusive fishery in the *locus in quo* was plantation lands in the counties of Donegal and Fermanagh within the meaning of the statute 10 Charles I, Session 3, c. 3, as in paragraph 10A of the amended statement of claim alleged, or that the same was passed by the letters patent aforesaid upon the Commission of Grace in the said paragraph 10A mentioned or at all; or that by virtue of sect. 1 of the said statute the letters patent aforesaid operated to vest in the said Thomas, Baron ffolliott, an indefeasible estate in fee-simple in the said several or sole and exclusive fishery in the *locus in quo* good or valid against the King's Most Excellent Majesty, his heirs and successors, or the Irish Free State, or the public, as members of whom the said defendants claim the right to fish in the *locus in quo*.

"8 B. The said defendants deny that the said several or sole and exclusive fishery in the *locus in quo* lay within the plantations mentioned in the statute 15 Charles I, c. 6, sect. 1, or was passed by the letters patent aforesaid upon the Commission of Grace in paragraph 10 B of the amended statement of claim alleged or at all; or that by virtue of sect. 1 of the last-

mentioned statute the said letters patent were good or sufficient or effectual or indefeasible to grant the several or sole and exclusive fishery in the *locus in quo* (which is the sole question in dispute in this action) either as against His Majesty King Charles I, his heirs or successors, or the Irish Free State, or the public, or that at the date of the said letters patent His Majesty King Charles I was, by virtue of sect. 1 of 10 Charles I, Session 3, c. 3, or of sect. 2 of 15 Charles I, c. 6, absolutely or indefeasibly entitled to the said several or sole and exclusive fishery in question in this action as in paragraph 10B of the amended statement of claim alleged.

"8 C. The said defendants contend that, on the true construction of the statutes 10 Charles I, c. 3, and 10 Charles I, Session 3, c. 2 and c. 3, and 15 Charles I, c. 6, the said statutes deal merely with defects in title arising out of informalities or irregularities in the Commissions and Inquisitions therein recited and referred to, and did not enable the Crown to create the said several or sole and exclusive fishery in the estuary of the Erne in question in this action; and, further, that, on the true construction of the said statutes, the rights of the public to fish in the estuary of the Erne were unaffected by any of the provisions therein contained, and the rights of any persons having estates or interests in the hereditaments referred to in the said statutes are preserved save as is in the said statutes expressly provided; and, further, that the said statutes, so far as they relate to plantation lands or hereditaments lying within the plantations mentioned in such statutes, have no application to the several or sole and exclusive fishery in the estuary of the Erne, which was neither plantation lands, nor lying within the plantations therein mentioned; and the said defendants rely upon the express provisions of the said letters patent quitting claim to Thomas, Lord ffolliott, of all and singular the conditions, covenants, articles, mandates, instructions and agreements of the plantation."

The defence of the Attorney-General was amended by adding, after paragraph 4 thereof, the following:—

"5. The said defendant denies that the letters patent mentioned in paragraph 10 of the amended statement of claim purported to grant or confirm, or did in fact grant or confirm, a several fishery for salmon or other fish in the tidal portion of the River Erne.

"6. The said defendant says that neither the hereditaments and premises purported to be granted by the said letters patent nor the said several fishery were plantation lands within the meaning of the statute 10 Charles I, Session 3, c. 3, or were passed by the said letters patent upon the Commission of Grace referred to in paragraph 10A of the amended statement of claim or at all.

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"7. The said defendant will submit that the said statute has no application to, and conferred no validity upon, the said letters patent.

"8. The said defendant says that neither the hereditaments and premises purported to be granted by the said letters patent nor the said several fishery lay within the plantations mentioned in the statute 15 Charles I, c. 6, sect. 1; and will submit that the said section of the said statute has no application to, and conferred no validity upon, the said letters patent.

"9. The said defendant denies that His Majesty King Charles I was at the date of the said letters patent, or at any time, entitled to the hereditaments expressed to be granted thereby by virtue of the enactments mentioned in paragraph 10 B of the amended statement of claim or at all."

Jellett K.C., Overend K.C., Phelps K.C., Henry K.C., and *Newett* for the plaintiffs.

Bewley K.C., Lavery K.C., and *E. J. Kelly* for the Attorney-General.

P. Lynch K.C., Meredith K.C., M'Loone K.C., M. Maguire K.C., and *M'Guckin* for the defendants other than the Attorney-General.

The following cases were cited:—*Malcomson* v. *O'Dea* (1); *Sturla* v. *Freccia* (2); *Mercer* v. *Denne* (3); *Neill* v. *Duke of Devonshire* (4); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (5); *Goodtitle, Lessee of Parker*, v. *Baldwin* (6); *Johnson* v. *Barnes* (7); *Goodman* v. *Mayor of Saltash* (8); *Attorney-General* v. *Irish Society and Others* (9); *Ashworth* v. *Browne* (10); *Johnston* v. *O'Neill* (11); *Tighe* v. *Sinnott and Others* (12); *Carter* v. *Murcot* (13); *Murphy* v. *Ryan* (14); *Doe, Lessee of Hayne and His Majesty*, v. *Redfern* (15); *Attorney-General* v. *Emerson* (16).

Cur. adv. vult.

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JOHNSTON J.:—

On the 11th of March, 1869, in the matter of the estate of Thomas Connolly, owner and petitioner, William Cary Dobbs, as Judge of the Landed Estates Court, by virtue of the various statutes giving jurisdiction to that Court in respect of the sale and transfer of land, in consideration of the sum of £45,250, granted unto Samuel Maxwell Alexander, John Alexander, Robert Lyon Moore, Samuel Maxwell Moore, and Patience

(1) 10 H. L. Cas. 593.
(2) 5 A. C. 623.
(3) [1905] 2 Ch. 538.
(4) 8 A. C. 135.
(5) [1914] A. C. 153.
(6) 11 East, 488
(7) L R. 7 C. P. 592.
(8) 7 A. C. 633.
(9) 47 Ir. L. T. R. 123.
(10) 10 Ir. Ch. R. 421.
(11) [1911] A. C. 615.
(12) [1897] 1 I.R. 140.
(13) 4 Burr. 2162.
(14) Ir. R. 2 C. L. 143.
(15) 12 East, 96.
(16) [1891] A. C. 649.

Munn, their heirs and assigns for ever as tenants in common (*inter alia*), the salmon fishery or fishery for salmon by nets, loops, weirs, or otherwise howsoever from the bar of Ballyshannon, in County Donegal, in and throughout the whole extent of the River Erne and the waters thereof, together with certain islands and buildings in that river, and also "the salmon fishery and liberty and right of taking salmon of the said Thomas Connolly in and upon the said rivers Erne and Abbey and in and upon all rivulets, creeks, and waters near or belonging thereto in the counties of Donegal, Fermanagh and Cavan"; and also the eel fishery at or near the town of Ballyshannon; and also the liberty and right of taking herring and all other kinds of fish in the river of Ballyshannon from the high sea in and through the whole extent of the River Erne and the waters thereof. The premises were granted indemnified from all quit rents by the manor of Ballyshannon, and were subject to certain leases. The waters of the River Erne from the bar of Ballyshannon to the falls of Assaroe in or at the town of Ballyshannon are tidal, and it is the fishery rights in those tidal waters alone with which I am concerned in the present action.

The plaintiffs claim to be the successors in title of the grantees in the conveyance of 1869, and there is no doubt that since that date, and until 1925, they and their lessees exercised, exclusively of the public, the right of fishing in these tidal waters, which were supposed to have been granted to them by the Landed Estates Court conveyance; and there appears to have been during that long period of 56 years a general acquiescence by the public of Ireland in the plaintiffs' claim to this fishery. Upon a few occasions in recent times a trespass by particular individuals took place—trespass that was in every instance successfully resisted by the plaintiffs or their predecessors; but, in my opinion, the evidence as to these matters does not materially assist the plaintiffs in the present action, nor does it, under the special circumstances that were proved to have existed on each occasion, prejudice to any extent the case made by the defendants.

The present action originated in an occurrence which took place in June, 1925, when a number of the special defendants entered upon the tidal waters of the River Erne at Ballyshannon, and fished therein from a boat. Summonses were immediately issued by the plaintiffs against these persons, and, on the hearing of the same, the District Justice held that a question of title was involved, and he ruled accordingly. An absolute order for a writ of mandamus was made by the High Court of Justice (the President, and Hanna and O'Byrne JJ.) on March 26th, 1926, commanding the District Justice to proceed to hear and determine the summonses according to law, but this order was discharged by the Supreme Court (FitzGibbon J. dissenting) on February 28th, 1927, when it was held by the Chief

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Justice and Murnaghan J. that a question of title was involved, and that the jurisdiction of the District Justice was ousted (1). Judgments of the greatest weight and importance were delivered in the course of these proceedings, but, as I conceive it, the actual question decided was that which I have stated.

The result of these lengthy proceedings was that the plaintiffs failed in their efforts to assert their rights; and in May of that year a large number of persons, of whom the present defendants were amongst the number, entered upon these tidal waters with boats and nets and began to fish, claiming a right as members of the public to do so. This step was taken with due deliberation, and after notice had been given to the Civic Guard. The plaintiffs issued the writ in the present action upon May 13th, 1927, claiming an injunction and a declaration as to title.

The plaintiffs claim that by virtue of the deed poll of 1869 the grantees therein became indefeasibly entitled by statute to the several fishery in the tidal waters in question, and that that right is now vested in the plaintiffs. The effect of a Landed Estates Court conveyance, as set out in sect. 61 of the Landed Estates Court (Ireland) Act, 1858, is to vest in the grantee, subject to such tenancies, charges, and rights as may be expressed to be reserved, the fee-simple and inheritance of the lands, "discharged from all former and other estates, rights, titles, charges and incumbrances whatsoever of Her Majesty, her heirs and successors, and of all other persons whomsoever." I do not think that the Supreme Court intended in *Rex (Moore)* v. *O'Hanrahan* (1) to decide anything as to the operative force or effect of the deed poll of 1869 other than that, in the proceedings before the District Justice, it was not final or conclusive as evidence of the complainants' title.

In the case of *Mecredy and Others* v. *Alexander and Others* (2) the deed poll of 1869 was discussed and analysed very fully in the House of Lords on April 6th, 1883, by the Lord Chancellor, and Lords Blackburn, Watson, Bramwell, and FitzGerald. The proceeding was one to test the respective fishery rights in the inland and non-tidal portion of the River Erne of the present plaintiffs or their predecessors in title on the one hand, and the lessees or tenants of the Marquis of Ely, who owned the riparian lands to the south of one portion of the river, on the other. Their Lordships, appreciating fully the potent effect of a Landed Estates Court conveyance, and knowing the extent to which such titles form the basis of the ownership of property in Ireland, treated this deed poll with a caution and respect to which its Parliamentary origin entitled it. In some respects its provisions were in terms admitted to be indefeasible. Thus, as the Lord Chancellor pointed out, the plaintiffs had obtained an absolute Parliamentary title to the

(1) [1927] I. R. 406. (2) Unreported.

small island known by the name of the Salmon Island. He pointed out, however (at p. 4 of the copy of the judgment that was supplied to me), that in cases where the title was not easy to investigate, or where the property was of a nature which did not easily admit of definition and exact description, the Court might with propriety qualify the description of the subject-matter. Accordingly, it was held that, notwithstanding certain general conveyancing words in the deed upon which the plaintiffs relied, the general effect was no more than a conveyance of such fishery as Thomas Connolly had. Lord FitzGerald said: "We do not intend in the slightest degree to trench upon the authority of the cases which have been decided as to the extraordinary Parliamentary effect to be given to a Landed Estates Court conveyance when once you have ascertained beyond doubt or ambiguity what is the subject-matter of that conveyance." He added later, that, looking at the terms of the deed, he came to the conclusion that what was intended to be conveyed was not a general or exclusive fishery from one end of the River Erne to the other, but that fishery which Thomas Connolly had, and which had been demised by him to his lessees. Lord Blackburn said that the Court had to examine the words of the grant, and to see "whether they are or are not such as would exclude all possible evidence of extraneous matter." Lord Bramwell said that the deed must be read "as a grant or conveyance of the right of salmon fishery which Connolly had, wherever that right existed throughout the whole extent of the rivers Erne and Abbey and the waters tributory thereto."

The Landed Estates Court having therein deliberately and advisedly left undefined the extent of Connolly's fishery, it was decided that the admission of evidence to clear up that matter as between the plaintiffs and Lord Ely was quite right and proper, and it was then found that at the *locus in quo* neither Connolly nor his lessees, the Sheils, had ever exercised any rights of fishing at any time. As was pointed out by Lord Blackburn, those rights "were enjoyed by Lord Ely," and "were never enjoyed by the Sheils, and also never belonged to Thomas Connolly." It followed that the rights of fishing that were in controversy in *Mecredy* v. *Alexander* (1) could not be regarded as included in the deed poll at all, and formed no part of the property which the plaintiffs acquired thereunder.

It has been argued on behalf of the plaintiffs that there is implicit in the judgments of the Law Lords a decision that if, on the evidence, it had been found that the fishery at the *locus in quo* claimed by Lord Ely had been part of the fishery owned and enjoyed by Connolly and his lessees, then the deed poll would be regarded as having its proper Parliamentary potency, and that the plaintiffs' rights thereunder could not be further

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questioned. It is contended further that the fishery in the tidal waters forms a separate and quite distinct portion of the property granted; that Connolly and his predecessors had exercised the exclusive right of fishing therein from time immemorial; that there is no evidence that the members of the public had ever at any time fished there as of right; and that, those facts being established, the deed poll must be regarded, so far as the tidal waters are concerned, as indefeasible, as it would have been if the facts proved in *Mecredy* v. *Alexander* (1) had been otherwise. It is argued further, as a corollary to that contention, that if any other conclusion is arrived at, the whole deed, so far as the fishery in tidal waters is concerned—and that tidal waters were intended to be included in the subject-matter of the deed for some purpose is evident from the reference to the bar of Ballyshannon—is nugatory and futile, and conveys nothing whatsoever; or, at any rate, that it must be read as conveying Thomas Connolly's interest, with the addition of the words "if any," or words to that effect.

The Attorney-General, who was joined in this action as a defendant, "as representing the public and the State of Saorstát Éireann," did not contest the title of the plaintiffs as from 1869, when Thomas Connolly's fishery reached the hands of the four grantees in the deed poll. The special defendants did not adopt a similar course; but, as they were entitled to do, put the plaintiffs on the strictest proof of their title from that date down to the date of the hearing. Accordingly, the best part of two days was spent in proving the long series of grants, devises, marriage settlements, mortgages, releases, and appointments of trustees, by which the interest under the deed poll reached the hands of the plaintiffs. I am satisfied that the chain of title is complete, and I do not think that any good purpose would be served by my setting it out in full in a judgment which must necessarily be of an exceptionally lengthy character. I wish to add, however, that the special defendants are either members of the public who have exercised their right of fishing in tidal waters, in which there is not, and never was, a several and exclusive fishery, or they are mere trespassers. If they are the former, anything that happened, or did not happen, since 1869 cannot be of any importance. If they are the latter, then any technical defects in the plaintiffs' title, such as the fact that a fragment of a legal estate was outstanding, or that there was no trustee of a particular settlement, or that a fraction of this tenancy in common was not before the Court, could scarcely disentitle the plaintiffs to at least a substantial portion of the relief they claim.

The question of the existence or non-existence of an exclusive right of fishery in tidal waters is ultimately dependent upon the provisions of Chapter 16 of Magna Charta. The Great

(1) Unreported.

Charter, as agreed upon by John and the Barons at Runnymede, on June 15th, 1215, was formally enacted and confirmed in the succeeding reigns on several occasions, the last time being in the 25th year of Edward I, and it is this confirmation which appears in the Revised Statutes as the copy of the Act which has survived the work of statute revision. Chapter 16 provides as follows:—

> "Nullae ripariae defendantur de caetero, nisi illae quae fuerunt in defenso tempore Henrici regis avi nostri, per eadem loca et eosdem terminos, sicut esse consueverunt tempore suo."

The English translation of this Chapter, as set out in the Revised Statutes, is as follows:—

> "No banks shall be defended from henceforth, but such as were in defence in the time of King Henry our grandfather, by the same places and the same bounds, as they were wont to be in his time."

The modern law as to the construction and the scope of operation of this clause of the Great Charter is to be found in the two cases of *Malcomson* v. *O'Dea* (1) and *Neill* v. *Duke of Devonshire* (2)—cases which have in this Court the double advantage of being decisions of the highest Court of Appeal in the land, and of being concerned with claims to a right of fishing in tidal waters in Ireland. In the one case the tidal waters of the Shannon, and in the other the tidal waters of the Blackwater were the *locus in quo*; and the same class of evidence—inquisitions, Crown grants and patents, leases and Crown rentals—was offered by the plaintiffs as was discussed in the present action. So that, so far as the general law on this subject is concerned, these cases are peculiarly useful. In both these cases the difficulty in the way of proving by actual evidence the existence of a several fishery in tidal waters in the time of Henry II was pointed out, and emphasised; and it was stated during the course of the argument before me that, in fact, there was only one place in Ireland in respect of which such actual evidence of that matter was forthcoming—and that was the ancient fishery of the Dublin Corporation in the Liffey. But it is doubtful if even the case of Dublin be an exception to the general rule. Neither of the Charters granted by Henry II to the Irish capital contains any grants of fishing rights whatever, and it was not until 1200 that King John granted one-half of the fishing in the river to the Corporation.

Mr. Justice Willes, who delivered the unanimous judgment of the advisory bench of Judges in *Malcomson* v. *O'Dea* (1), pointed out, in a passage that has been often quoted, the way in which the difficulty arising from the lack of evidence may

(1) 10 H.L.C. 593. (2) 8 A. C. 135.

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be overcome. He said: "The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence. In some cases written statements of title are admitted, even when they amount to mere assertion, as in the case of a right affecting the public generally." He said, further (p. 618): "If evidence be given of long enjoyment of a fishery, to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the result is, not that you say, this is a usurpation, for it is not traced back to the time of Henry II, but that you presume that the fishery being reasonably shown to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory."

In *Neill* v. *Duke of Devonshire* (1) Lord O'Hagan (p. 158) puts the matter thus: "Proof of previous appropriation, by documentary or parol evidence, at such a distance of time, cannot be obtained, although there may be plausible antiquarian speculation about it; and, therefore, from the necessity of the case, the doctrine which this House accepted in *Malcomson* v. *O'Dea* (2), determined that possession and user of a fishery, as several and exclusive, continued for a sufficient period, justifies the assumption that it had its origin legally and not illegally, and at a period at which the law permitted it rightfully to originate, although so remote as to render evidence of the circumstances of its creation unattainable."

That being the principle upon which, according to the House of Lords, long-continued exclusive possession and user of tidal waters for fishing purposes may be linked up with a rightful origin for such possession and user arising in the time of Henry II, I now proceed to discuss the various documents of title upon which the plaintiffs rely. Perhaps it would be convenient at this stage to say that many of the documents that were offered in evidence by the plaintiffs relating to the title to this fishery in the sixteenth and seventeenth centuries were objected to by one or other of the defendants. Some of those documents I do not intend to refer to, and I have not taken them into account in arriving at my conclusions. All the documents that I am now about to discuss have, in my opinion, been proved, and are relevant to the issues in this action. Where they are not original documents, they represent the best secondary evidence that is now available, taking into account the lapse of time and the destruction of the Four Courts. The big historical issue that the defendants have raised has widened very considerably the scope of the issue as compared with the comparatively narrow issue involved in most of the previous

(1) 8 A. C. 135. (2) 10 H.L.C. 593.

cases, and that widening of the issue has had a corresponding effect upon the question of the relevancy of many of the documents offered in evidence. Many of the objections that were made to the admissibility in evidence, and to the relevance of the inquisitions, leases, Crown grants, and letters patent, Royal Commissions and Crown rentals, to which I shall now refer, had already been made in *Neill* v. *Duke of Devonshire* (1), and I shall content myself with referring generally to the judgment of Chief Baron Palles, as reported in 2 L. R. Ir. 132, and to the judgments in the House of Lords (2), particularly the judgments of Lord Selborne and Lord Blackburn.

The first piece of documentary evidence that the plaintiffs have been able to produce is an inquisition taken at the town and monastery of Assaroe by John Crofton, the Escheator and Foedary of Queen Elizabeth, on November 26th, 1588. As it is the first document of title available, and as it deals specifically with the waters that are in question in this action, I must refer to it in some detail. There is a recital that by divers statutes all abbeys and monasteries, with their lordships, manors, tenements, profits and appurtenances, do by right belong to Elizabeth by virtue of her crown, and that there is an abbey at Assaroe of the order of St. Bernard. The lands of the abbey and the buildings thereon are then described with great minuteness, including the site of the abbey, the town of Assaroe, and certain surrounding lands, the whole consisting of about fifteen and one-eighth quarters of lands, and forming the demesne lands of the abbey. The names of the townlands are set out with particularity, and they correspond largely with the names of the surrounding townlands in modern times, as proved by the evidence of Mr. J. H. Scaife. The jurors then "say that ten weirs for fishing for and catching eels in and upon the water which is called the Erne belong altogether to the Abbey aforesaid which beside repairs and other deductions are worth yearly 10 shillings sterling current money of England; and they say that the Abbot and Convent of the Abbey aforesaid had in right of their abbey or house aforesaid liberty for two fishermen to fish for salmon in the place of the stream or river called the Erne, which is called Assaroe, near Bealashenan, every year at the time when salmon are caught, and the second cast or draught (in English 'the second draught') of all the fishers at the Assaroe when they commence to fish, and liberty for one skiff to fish from the island up to the sea below for salmon or other fish, which fishing is valued yearly at 3s. 4d. sterling money of England aforesaid, which premises are temporalities of the Abbey aforesaid."

The inquisition then states that the abbey, and all the castles, lands, tenements, tithes, and other profits of every kind therein specified belonged to the Queen in right of her crown, and the

(1) 8 A. C. 135.

(2) 8 A. C., at p. 172.

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seals of the Escheator and the fifteen jurors follow. There is an endorsement on the back that the inquisition had been delivered into the office of the Chief Remembrancer of the Queen on February 4th, 1589, by the hand of Robert Florence, servant of the Escheator.

There can be no doubt whatever that the waters with which these fishings were concerned included the tidal waters of the Erne. The terms of the inquisition itself, coupled with the evidence of Mr. Scaife, made that absolutely clear. It has been assumed that the ten weirs that were there were situated higher up in non-tidal waters, though there is no evidence as to the distance up the river that the tide flowed and re-flowed 350 years ago. Be that as it may, the plaintiffs contend that this inquisition supplies evidence of the most cogent and striking character that in 1588 the fishing in the tidal waters of the Erne had been appropriated, or put in defence, and was owned in severalty by someone. It is abundantly clear that this privilege was a form of property, or an interest in property, and had a money value, the amount of which is found by the inquisition. The rights of the monks, so far as fishing was concerned, purported to be of a limited character; but it is contended on behalf of the plaintiffs that a finding by the jury of such a definite character is even stronger evidence of an appropriation of the whole at some previous period than if there had been a finding of a more general character. The defendants have endeavoured to counter this argument by advancing various theories. The most important of these is the suggestion that the monks of St. Bernard when they came to Assaroe, about 1184, were strangers, and that they possessed—or, rather, that they were entitled to claim—none of the rights of fishing, which the people of the country communally owned. It is suggested that the rights set out in the inquisition were given to them as a franchise in the nature of a tithe. That contention, however, raises many difficulties. First of all, it may be said that, while such a theory may be consistent with the right of taking "the second cast or draught," it is not at all consistent with the rest of the rights that the abbey enjoyed —particularly the right of two fishermen to fish, and the liberty to fish with one skiff. Secondly, it is to be observed that towards the end of the inquisition the whole of these different rights or properties are described as the "temporalities of the abbey." The various tithes that the monks were entitled to are dealt with separately and in express terms throughout the inquisition. Thirdly, there is nothing in the inquisition to show that the fishing rights had come to the abbey by any other title than that by which they had acquired the lands and buildings; and it is contended by the plaintiffs that the grantor of the latter must have been the grantor of the former, and that a grant of the fishing rights which the monks appeared to possess was

absolutely impossible—or, at any rate, futile and meaningless—if the public as a whole was entitled to fish in these waters: in a word, that the proprietorship of the limited rights of fishing that the abbey was found to possess connoted an effectual ownership by someone of what remained.

These difficulties, which have given rise to a very serious controversy between the parties, however, are elucidated to some extent by the documents to which I shall now refer. The inquisition at Assaroe, having found in 1588 that the fishing rights of the monks in the waters of the Erne were then vested in the Crown, at an inquisition at Rathmullan, held by William Crofton, Deputy Escheator, on September 5th, 1603, seventeen jurors of the county found that the fishings in the rivers of Donegal and Killybegs, in Co. Donegal, up to the limit of the flow of the sea of those rivers belonged to the King in right of his crown as well as "all the fishings and fishing weirs of the lough, pool and river called Loughearne (as well of eels as of other fish) and also all the fishings as well of salmon and herrings as of other fish in the ports and bays of Ballyshannon and Bundroyse (with all other neighbouring places, bays and ports in which fish are wont to be caught)." This inquisition purports to have been sealed with the seals of Crofton and the seventeen jurors. Whatever questions may arise as to the scope of the earlier inquisition, there can be no doubt as to the extent of this very compendious finding. On October 14th, 1603, a lease for 21 years of the whole of these fisheries was made by the King to one John Binglie, the consideration being a fine of thirty shillings and a rent of forty shillings, namely, ten shillings in respect of the fishings in the rivers of Donegal and Killybegs, and thirty shillings in respect of the "Loughearne, Ballyshannon and Bondrois" fishery. This lease refers with particularity to "all the aforesaid fishings and taking of salmon, herrings, and all other fishes in the ports or bays of Ballyshannon or Bondrois." Whatever, then, may have been the earlier title, and at whatever date the claim of the Crown may have been first made, there can be no doubt as to the meaning and effect of the Rathmullan inquisition and the Binglie lease.

The plaintiffs then rely on a celebrated historical document, which has roused fierce controversies and passions in the past; but I need not say now in this Court of Saorstát Éireann, in the twentieth century, that it must be looked at in the most dispassionate manner, and quite apart from rights or wrongs which may be supposed to have existed in the fifteenth and sixteenth centuries. In this case I am concerned alone with the legal rights that are claimed and contested, and the political and racial considerations of which this, and many of the documents to which I must refer in the course of this judgment, are reminiscent, cannot possibly be an element in the decision. The document to which I now refer is the grant made on

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February 10th, 1604, by James I to Rorie O'Donnell, Earl of Tireconnell, and his heirs male, with remainder to his brother Caffrey, and his heirs male, of the whole of the territories or countries of Tireconnell. The grant is made in as large and ample a manner as Rorie's brother, Hugh ("attainted and dead in Spain"), or his father Hugh McManus, or his grandfather Manus, or any other of his ancestors, had enjoyed or possessed the same. This document, strictly speaking, cannot be regarded as a document of title, but it is referred to by the plaintiffs for the purpose of showing the consistency with which the Ballyshannon fishery was treated by the Dublin authorities. Executed as it was a few months after the lease to Binglie, it expressly reserved all churches, abbeys, tithes and spiritual hereditaments, the castle and town of Ballyshannon, with 1,000 acres of land surrounding the same, and the entire fishings belonging to the said castle in all the rivers within the said town and the 1,000 acres of land. There is an indorsement on this patent roll that on March 18th, 1600, Queen Elizabeth had granted to Neal Garve O'Donnell "the custody" of Tyrconnell, "except the castle of Ballyshannon and 800 acres adjoining," to hold to the said Neal during pleasure.

Another document, of what may be described as collateral interest in the tracing of the plaintiffs' title, is the grant of the King to Robert Leycester, made on May 17th, 1604, of certain attainted lands at widely different places in Ireland. These lands included the lands of Ballinemanagh, in Co. Fermanagh, which are described as belonging to the abbey of the monks of St. Bernard of Asheroe, and as situate on the south side of the River Erne, in the territory of Mogeny, and the lands of certain other abbeys, including the lands of the Franciscan friars of "Omey" (which is Omagh), in Co. Tyrone. The grant includes also "two weirs (in English called 'twoe ffshinge weares')" on the Sligo river which had belonged to the Franciscan friars of Sligo.

The lease to Binglie was made on October 14th, 1603, and it would appear that either it never became effective or it was surrendered to the Crown almost immediately; because we find that on June 7th, 1606, a new lease of these very fishings was made, with other hereditaments, to one Sir Henry ffolliott for 21 years. The form of the lease differs from that to Binglie in that it demises, first, the limited rights of fishing which the monks were found by the inquisition of 1588 to possess, and, secondly, the remainder of the fishing rights in the River Erne, which is now alleged to belong to the King. The parcels of hereditaments demised include certain forfeited lands in County Dublin and the rectory of Tirhugh, in the County Donegal, "which" (says the lease) "extendeth from the lands of the Abbey or house of monks of the order of St. Bernard of Asheroe to the mountains called Barnesmore, that is to say, the third

part of all the tithes thereof thereupon to the said Abbey belonging, and also all that those ten ruinous gurg' called weirs for fishing and taking of eels in and upon the water and flood called the Earne betwixt the lake of Lough Earne and the Castle of Ballishanon to the said Abbey belonging in the counties of ffermanagh, Donegal, Leytrim and Sligoe, and either of them, and also liberty for two fishers to take salmon in the river or flood called the Earne which is called Asheroe near Ballishanon in the countie aforesaid at all tymes in the year when salmon should be taken, and also the second draught of all fishing at Asheroe aforesaid when fishing beginneth, and also the liberty for one boate or driver to fish from the island or rock to the lower sea for salmon or other fishes in or within the port or bay of Ballishanon yearelie, and also two third parts of the tithes of corne and hey and all other things tithable, rising, growing or renewing of or out of quarter of [certain lands set out] all which were parcell of the possessions of the late Abbey'' (in as full and ample a manner as they came to the King's hands and those of his progenitors by reason of the dissolution of the monasteries), ''and also all that the whole fishing and taking of salmon and herring and all other kind of fishes of, in or within the ports, bay, creeks or floods of Ballishanon, Bondrois and Calbegge in the Counties of Donegal, Leytrim and Sligoe and either of them, together with all the places, bays, porte, and small ports, creeks and waters next and thereunto neere adjoining, wherein fishes were accustomed to be taken.''

The rent reserved in respect of all the hereditaments so demised amounts to a total sum of seven pounds Irish, and this sum is appropriated to the various parcels. The appropriation of rent in respect of the fishings is relied upon by the plaintiffs as a *contemporanea expositio*, which places the meaning of the inquisition of 1588 beyond doubt. This part of the reddendum runs as follows:—''For and out of the ten ruinous weirs in the river of Earne thirteen shillings and fourpence; for and out of the liberties of fishings and day's fishing and fishes above mentioned belonging to the Abbey of Asheroe the sum of five shillings; . . . for and out of the whole fishing of salmon and herring aforesaid [in] the baye of Ballyshannon, Bondrois and Calebegg [Killybeggs] the sum of thirty-six shillings and eightpence.'' It is contended with much force that it is impossible to conceive the possibility of a letting of, and a reservation of rent out of, property which belonged to or, at any rate, was enjoyed in common by the public as a whole.

For some reason which does not appear on the face of the document, it was thought necessary to give a new lease to ffolliott, and that was done on July 6th, 1607, by a document which is substantially a copy of the lease of 1606. The premises demised, the rent reserved, and the details as to the appropriation of the rent are the same; but the term was for a period

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of 20 instead of 21 years. Probably it was thought that as ffolliott had had the benefit of the first lease for a year, and as the King's Commission limited the period for which lettings might be made to 21 years, it would be safer to observe the spirit of that limitation.

The next document is one which purports to create a title of a more permanent character. On April 12th, 1608, a grant was made by the King to one Francis Gofton of the abbey, the abbey lands and the fishings connected with the same. The description of the hereditaments granted follows closely enough the parcels in the leases to ffolliott, but there are one or two differences which deserve to be noted. The number of ruinous weirs is stated to be twelve, and not ten, and are said to be situated in that portion of the river between the lough and the castle of Ballyshannon, and then, immediately following the reference to the weirs, is the following clause:—"Together with two placed upon the rock (in English 'two loopes uppon the salmon leape') for catching salmon near the castle of Ballyshannon with the appurtenances." This clause suggests very plainly that there was in the tidal portion of the river some structure of a permanent character for the catching of salmon. The description of the abbey fishery concludes with the words:—"All which are free customs to the said Abbey from old time belonging." It appears to have been intended that the grant was made subject to ffolliott's lease, because a later clause in the deed explains that the grant was made of all and singular the reversions and remainders of all the premises granted, "dependant or expectant of, in, or upon any gift or gifts, grant or grants, demise or demises whatsoever of the premises," with the benefit of any rent or profit reserved upon any demise or grant. The hereditaments were to be held "of us, our heirs, and successors" in free and common socage, subject to a rent payable "to us, our heirs and successors" of eight pounds ten shillings, current money of Ireland. There are also certain general clauses in the concluding part of the grant which are distinctly suggestive of covenants for good title and further assurance on the part of his Majesty, "our heirs and successors," which are worthy of a close scrutiny by counsel for the Attorney-General in the light of the Constitution of Saorstát Éireann.

On July 20th, 1609, a grant of vast tracts of land in the counties of Cavan, Longford, Westmeath, Meath, Kildare and Cork, and the counties of Cork and Dublin, was made to Mary, Baroness of Delvin, and her son, Sir Richard Nugent, which it is hard to reconcile with the previous leases and grants. After mentioning a large number of denominations of land in different counties, this document sets out the following hereditaments:—"And also the creek, bay, river or stream of Ballishannon, namely, from the high sea up to the rock or waterfall (in

English 'the fall of a water or salmon leap') near the castle of Ballishannon; likewise the same rock or waterfall, with the appurtenances; and also all pools (in English 'pools'), islands and rocks in or within the creek, bay and river; and also the bottom and soil of the creek, bay, river or stream and pool aforesaid, covered with water; and also all and singular the fishing and liberty of fishing and the catching of salmon and all other kinds of fish whatsoever in or within the creek, bay, river, stream or pool aforesaid, and upon the rock aforesaid; and also a certain eel weir (in English 'an eele weare') commonly called O Donnell's weare, with the appurtenances in the river Earne,'' with certain consequential rights of way and rights of spreading and drying nets, and of bringing away such fish as might be caught. This part of the grant was subject to a Crown rent of £6 13s. 4d. It will be observed that this was a grant merely of the soil and bed of the river and of the right of fishing therein, and did not include the abbey, the abbey lands, the castle of Ballyshannon, or the surrounding lands. This grant probably is explainable upon the supposition that, so far as the Ballyshannon fishery was concerned, it was made subject to ''demises or grants made for a term of life, lives or years or otherwise of the premises before granted or any of them, and covenants and conditions contained in the same.'' In a public record, entitled ''Crown Rental Ulster, 1819,'' under the heading ''Donegall, 1619,'' there is an entry of a payment of £6 13s. 4d. made by Sir Henry ffolliott, with this explanation: ''The same Sir Henry ffolliott, knight, assignee of Richard, Lord Baron of Delvin, holds the creek, bay, or river of Ballyshannon, with the whole fishing of the same, &c, yielding thereout yearly £6 13s. 4d.''

The Ballyshannon and Erne fishery was dealt with by the jurors upon an inquisition taken at Lifford on September 12th, 1609. The main purpose of that inquisition seems to have been to distinguish the ecclesiastical lands and hereditaments in County Donegal from the lands belonging to the Crown. There is a finding by the jurors that so much of the salmon fishing at Ballyshannon as lies upon the lands of the ''late dissolved Abbey of Asheroe,'' belongs to that abbey, and that all the rest of the tithes of the said salmon fishings belong to the Bishop of Clogher; and there is a further finding that all the lands and fishings of the abbey were then in the possession of Sir Henry ffolliott. The tithes payable by ffolliott to the bishop out of certain defined lands are ascertained, and these lands are described as '' part of the thousand acres of land belonging to Ballyshannon.'' I have been referred in the same inquisition to a finding as regards the parish of Enivernale, that ''one moiety of the royalties of fishing belonged to the bishoprick of Raphoe and the other moiety belonged to the O'Donnells.'' There is a further general finding that ''the whole county of Tirconnell, otherwise called

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O'Donnell's county, and all lands, tenements, fishings, royalties and hereditaments within the said county of Donegall [except the said county and lands of Inishowen and except all castles, lands, tenements and hereditaments above mentioned to belong to any bishoprick, deanery, abbey, monastery or religious house] are now in the real and actual possession of the Crown by reason of the attainder of treason of Rorie, late Earl of Tyrconnell." The fishery which is set out previously in the inquisition as having belonged to the abbey of Asharoe, and as being then in the possession of ffolliott, would, on the true construction of this document, appear to come within the terms of the exception.

An inquisition held at Lifford on March 21st, 1620, records a number of findings that are not inconsistent with what had gone before. The jurors "find and present that there is a royal salmon fishing in the sea below Ballyshannon called the salmon leap of Ballyshannon within the said county where it doth ebb and flow and is navigable with ships, barques, lighters and boats." This fishing, and the rents and profits thereof, were found to have been in the possession of ffolliott and his assigns for sixteen years, and it is probable that he was in occupation of the fishery for some little time before the leases of 1606 and 1607 were executed.

An inquisition taken at Ballyshannon on January 2nd, 1620, contains a great mass of information as to various grants of lands and other hereditaments in Donegal and Fermanagh that had been made by the King during the previous ten or fifteen years to Gofton, ffolliott, Leycester and Delvin. A close study of the long lists of townlands therein, and of the various boundaries that are set out, would, I have no doubt, elucidate many, if not all, of the difficulties that cluster round the apparently conflicting claims of these friends of the Dublin Government. I am, however, only concerned with the document in so far as it throws light upon the Ballyshannon fisheries. The inquisition opens with a recital of the grant of April, 1608, to Francis Gofton, of the Abbey of Asheroe, with certain surrounding lands, the twelve ruinous weirs upon the River Erne, and the fishery of the monks at Ballyshannon. Certain local information appears to have been forthcoming at the taking of the inquisition, for the ancient names of these weirs are for the first time set out in writing; and the description of the Ballyshannon fishery (which follows pretty closely the finding in the inquisition of 1588) has the following gloss attached to it—a gloss that is not to be found in the inquisition of 1588, nor in the later documents:—"The said loops, fishers' draughts and boats being free of paying any tythe-fish, all which are free mensal customs to the said abbey of ancient time belonging."

It then appears that Gofton, by a conveyance dated May 20th, 1608, had granted to ffolliott, who is stated to have been in the actual possession of the same at the time, the abbey of Asharoe,

with all and singular the premises and their appurtenances, to hold to him and his heirs and assigns for ever. The inquisition recites also a grant by the King to ffolliott, dated November 30th, 1612, of the castle and town of Ballyshannon, with certain lands appertaining thereto; and it sets out the grant of lands to Leycester, dated May 17th, 1604 (to which I have already referred), and a deed of feoffment bearing date July 10th, 1604, by which Leycester granted unto ffolliott the lands that he had acquired. Finally, the grant to the Delvins, mother and son, of July 20th, 1609, of the lands in this neighbourhood, with the bed and soil of the river, "and all fishings and liberty to fish and take salmon and other kinds of fish whatsoever in or near the same and upon the rock beforesaid, and also an eel-weir, commonly called O'Donnell's weir, with the appurtenances in the river Erne," is set out; and it is stated that, by a deed of feoffment, dated January 20th, 1609, they had sold the premises to ffolliott, to hold unto him, his heirs and assigns for ever. It thus would appear that ffolliott, by a series of deeds, had gathered to himself all the divers threads of title to the abbey, the castle and town of Ballyshannon, the bed and soil of the river, the fishery rights of the monks, and the whole of the fishing rights in the Erne, with the incidental and ancillary rights, as set out in the Delvin grant of July 20th, 1609, to which I need not now refer.

ffolliott, however, appears to have been a man of prudence and foresight, as well as a man of great influence at Court, and he was not altogether satisfied with the title that he had variously acquired from Gofton, Leycester, and Delvin. He had been raised to the peerage by patent dated January 22nd, 1619, and we find that a grant was made to him by the King's Commissioners in Ireland (authorised thereto by the King's letters, dated October 22nd, 1618) on April 9th, 1622, in which all the hereditaments included in the previous grants were grouped together as one compendious whole, including the abbey, the castle and town of Ballyshannon, numerous denominations of land in Donegal and Fermanagh, the abbey fishings, "the aforesaid entire fishing and liberty of fishing to catch salmon and all other kinds of fish," the bed and soil of the river, together with the appurtenances and all the incidental rights and advantages which were included in the previous deeds. The rent payable to the Crown in respect of each block or class of property is set out with circumspection, and it is provided that the premises "with all and singular their appurtenances henceforward shall be and be held [as] one entire manor in fact and name and for ever shall be styled and reputed the Manor of Ballyshannon," with one court leet, or view of frankpledge and court baron to be held before the seneschal to be appointed by ffolliott, his heirs and assigns from time to time. It was provided, further, that the castle of Ballyshannon

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was to be maintained and kept well repaired and fortified by ffolliott and his heirs at his and their own cost and expense; and, lastly, there was the usual *non obstante* clause in regard to "any statute, Act, ordinance, or proviso." In addition to the King's commission, dated October 22nd, 1618, which is recited in the grant to ffolliott, there appears to have been a further letter from the King, dated October 20th, 1620, in which the Council in Ireland is directed to assure to ffolliott all the hereditaments held by him, giving him "a good, sure and indefeasible estate in fee without fine," with all the benefits, advantages, clauses, and things which may have been granted "to any other servitor in our province of Ulster."

ffolliott died soon after this grant was made to him, and an inquisition *post mortem* was held at Ballyshannon on March 1st, 1623, to ascertain and put on record the hereditaments of which he was seized. This inquisition sets out certain dispositions of portions of the property which ffolliott had made, including grants to Sir William Cole, of Enniskillen, and Sir Robert King on October 25th, 1622, the creation of annuities in favour of his sons, Michael and Charles, and his cousin, Francis, to be paid out of "the aforesaid Manor of Ballyshannon," and provision for his widow after his death. He died on November 10th, 1622, leaving Thomas, then aged nine years and eight months, his son and heir.

The next document, which brings me to what I may call the modern title of this fishery, is a grant made by Charles I on August 30th, 1639, to Thomas, Lord ffolliott, who was then 26 years of age, of the whole of these hereditaments. This is an important document, but, fortunately, it need not be referred to at any great length. It is recited that Thomas had paid to the King a fine or sum of £99 7s. 6d. by way of composition for certain rents, services, reservations, conditions and charges, and a grant is made by the Crown of all the hereditaments which were held by Thomas under James's grant of 1622. In the description of the abbey fishery, which again is separately granted, the twelve ruinous weirs have become eleven ruinous weirs, and the grant of the whole is made with the following addition:—"All which weirs, contrivances called 'loops,' skiffs or boats, draught of fish (in English 'the fishers' draught') aforesaid were reputed and are now reputed to belong to the said Abbey or the Abbot and Convent thereof from a time of which there is no human memory to the contrary." That statement is certainly not inconsistent with the first record that is forthcoming as to this fishery, namely, the findings of the inquisition at Assaroe, held more than fifty years previously. The "whole fishing" is granted in the very words of the grant of 1622; and, lastly, there is a clause which has a bearing on another branch of this case, namely, a clause releasing Thomas from the articles, conditions, and agreements of the plantation.

A proviso follows that ffolliott, his heirs and assigns, "at their own expenses and costs shall maintain, repair and retain the aforesaid castle and fortalice of Beallashanan, so that the buildings thereof be continuously strong and seemly, and that this castle for ever be maintained and kept well repaired, and fortified from time to time at the proper outlay and expenses of the said Thomas, Lord ffolliott, and his heirs and assigns respectively, so that neither we nor our successors in future may be charged for the maintenance of any military guard."

The chain of title to this fishery from Thomas ffolliott to Thomas Connolly, as proved by the plaintiffs, does not raise any question of difficulty or controversy. Thomas ffolliott survived many years of storm and stress in this country, and he died about the end of the seventeenth or beginning of the eighteenth century, leaving the property to his son Henry for his life, with remainder in tail male. Henry died in or about the year 1716, without issue, and the property then went under Thomas's will to the children of his three daughters, Rebecca Walker, Elizabeth Powell, and Mary Baughs, in equal shares as tenants in common. By a series of conveyances in 1718, 1719, and 1720 (namely, deeds of lease and release, dated July 30th and 31st, 1718; deeds of lease and release, dated December 29th and 30th, 1719; deeds of lease and release, of equal date; and deeds of lease and release, dated April 29th and 30th, 1720), the shares of the twelve children of the testator's three daughters were conveyed to the Right Honourable William Connolly in consideration of a total sum of £48,000. The last deed was executed on behalf of Anne Walker, who was a minor, by virtue of a private Act of Parliament of 6 Geo. I. The hereditaments reached the hands of Thomas Pakenham (who had taken the name of Connolly by virtue of a name and arms clause) through the medium of the will of William Connolly, dated October 18th, 1729; a marriage settlement of William Connolly, (the second), dated April 27th, 1733; a common recovery effected in the Common Pleas by Thomas Connolly (the son of William the second), in November, 1758 (the exemplification being dated as of the 28th of that month); the will of Thomas Connolly, dated May 27th, 1799, and a disentailing deed by Thomas Connolly (Pakenham) of December 26th, 1850, which was enrolled on January 22nd, 1851. This was the Connolly who was the vendor in the Landed Estates Court.

A matter upon which the plaintiffs rely most strongly, particularly as regards the defence filed by the Attorney-General on behalf of the Free State, is the fact that for nearly 300 years the plaintiffs' predecessors in title paid into the Exchequer of the country the Crown rent in respect of these hereditaments (including the Ballyshannon fisheries) reserved by the various Crown grants and leases that were made during the early part

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of that period. There is not an unbroken chain of evidence that the rent was paid continuously during the whole of that period, but there is evidence of a persuasive character that at particular periods it was being paid by the persons who owned the fishery at the time. I have no doubt that it was continuously paid. The Crown rent was redeemed on August 27th, 1897, for a sum of £719 13s. The redemption deed sets out the name of "Lord Folliott" as the "original tenant charged in the ancient Crown rent-roll." The denomination of lands entered in the ancient Crown rent-roll for or in respect of which the rent was payable is given as "the late monastery of Ashroe otherwise Ashrash, with others," in the Co. of Donegal, barony of Tirhugh. The capitalised value of the Crown rent as redeemed was duly received by the Government of the day. The question whether or not the Irish Free State is to be regarded as the successor of the Governmental authority existing in 1897, and whether the doctrine of estoppel could be said to apply as regards the Attorney-General, has not been argued; but the fact that the Attorney-General has taken sides so determinedly has been made the subject of strong comment on the part of the plaintiffs.

Evidence has been given, by means of the public records of Crown rentals, that in 1613 a Crown rent of 40 shillings was paid by ffolliott as the assignee of John Binglie, for the regalities and fishing of the ports and creeks of Donegal, Killybegs, and Loughhearn. There is an entry of forty shillings having been paid by Binglie himself in respect of the fishings in the rivers of Donegal and Killybegs, "and also of the whole fishing and catching of fish of the lakes, pools, rivers and streams called Loughearne of every kind of fish there being, and also of the whole fishing for and catching of salmon and herrings and of all other fish in the ports, creeks, bays and streams of Ballyshannon and Boundwise." There is, however, a note in this rental that the lease under which the rent was paid is "supposed to be a double chardy and granted to Sir Henry ffolliott as above said."

There is also a record of the payment of 13s. 4d. in the same year by Sir Henry in respect of ten weirs in the River Erne, and "of a licence for two fishermen for catching salmon, otherwise in English 'salmons,' in the aforesaid river of Erne with other [premises] parcel of the Abbey of Asheroe"; and the payment of 5s. for the catching of salmon and other fish "in the port of Ballyshannon parcel of the possessions aforesaid." There is also a record of payments of rent by the Delvins in respect of the hereditaments that they appeared to have owned in and around Ballyshannon, and by Leycester in respect of his hereditaments.

Evidence has also been given of the payment of rents for these hereditaments in 1619, in which year all these heredita-

ments seem to have reached the hands of Henry ffolliott. The rental which contains this entry is of value as affording evidence not only of the rents paid in respect of them, but of the existence of the hereditaments at the date in question, and of some of the transactions between ffolliott and the other owners.

From a Crown rental of Ulster of the year 1640, it would appear that Thomas ffolliott had entered into occupation of, and was paying rent in respect of, these hereditaments. One of the entries in this rental is as follows:—"Book 17. Defective [titles], p. 272. Thomas, Lord ffolliott, by patent dated 30th August, 15 Charles I. Yearly to him and his heirs for ever—£31 1s. 6d."

There is evidence of a conclusive character that the plaintiffs and their predecessors have been in the exclusive possession and enjoyment of this fishery since it was purchased in 1869. But there is evidence of actual user and enjoyment of a much earlier date. An Act of the Irish Parliament of 1763 (3 Geo. III, c. 35) was passed to protect the fishery rights of the "proprietors and farmers" of certain salmon fisheries in a number of the rivers, including "the river Erne, or salmon fishery of Ballyshannon," and the description of the rivers and places to which the Act was intended to apply, makes it quite plain that the statute was dealing with fishing in tidal waters—and possibly only in tidal waters. The importance of a statutory recognition of a proprietary right such as this Act supplies was pointed out by Crampton J. in *Hemphill* v. *M'Kenna* (1). Further, there is evidence that on March 17th, 1819, the fishery was leased by the trustees of the will of Thomas Connolly, deceased, to one Simon Sheil, and that it was subsequently leased on April 25th, 1860, by Thomas Connolly (Pakenham) to Alicia Sheil. Objection was taken to the admission of these leases, but, in my opinion, they were clearly relevant and admissible, and they are relied upon as evidence that at their respective dates the plaintiffs' predecessors were in possession of, and exercising proprietary rights in regard to the fishery which is now in dispute. The evidence that has been given of proceedings taken at the suit of the plaintiffs' predecessors against a number of persons who were alleged to be trespassers, if it does not assist the plaintiffs' case, certainly does not help the defendants. There is no evidence whatsoever—evidence, for instance, such as was given in *Neill* v. *Duke of Devonshire* (2), of cot-fishing in the Blackwater by large numbers of persons—that any claim—or rather any exercise—of a right to fish as a member of the public in these waters was effectually made at any time within living memory.

In *Neill* v. *Duke of Devonshire* (2) certain evidence of actual user and possession for a long period was adduced, and that evidence, with the documentary evidence that was produced,

(1) 8 Ir. L. R. 43, at p. 50.

(2) 8 A. C. 135.

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enabled the trial Judge to leave to the jury the question whether the Duke of Devonshire or his predecessors had a several fishery before Magna Charta. The jury found in the affirmative, and the House of Lords held that the verdict was legally unimpeachable for misdirection. In the present case the evidence as to actual user and possession is at least as strong as the evidence of that matter in the older cases. So far as the documentary title is concerned—and I may say that in my analysis of the plaintiffs' title I have by no means exhausted the documents, public and private, upon which it rests—the evidence to my mind is more complete, consistent, and persuasive than the evidence that was given in any of the other cases in which the question of the right to a several fishery in Irish tidal waters was raised. Let me refer once more for a moment to a few of these documents. A great deal of doubt was expressed as to the genuineness of the record of the inquisition at Assaroe, and its terms were closely—even severely—analysed and criticised; but if ever there was a document that bore on its face the impress of genuineness and truth, that document is the record of 1588. The inquisition was taken actually at Assaroe by John Crofton, the Queen's Escheator, and fifteen Irishmen of the locality, of whom nine were from the Ballyshannon and Assaroe area itself. It is plain to my mind that the minute details that the finding of the jury discloses as to the situation of the abbey, the buildings that it included, and the remarkable description of the fishery rights of the monks must have been learned in the locality from a personal inspection of the place and from local witnesses. It is not beyond the bounds of possibility, it is even likely, that the details of the fishing rights may have been taken from some ancient manuscript found in the abbey itself, or the information may have been supplied by the jurors themselves. In any case, it is impossible to think that this is a forged or concocted document. As regards the rest of the documentary evidence, I may say that, having examined it all with the greatest minuteness, I am amazed at the care with which these ancient documents were prepared, and the conveyancing skill with which the abbey fishery on the one hand and "the whole fishery" on the other were kept separate, until finally they both reached the hands of the plaintiffs' predecessors.

On the whole, then, I am satisfied that, apart from the next question, with which I am about to deal, there is extraordinarily strong evidence that enables me to make the presumption that before the time of legal memory, that is to say, in the time of Henry II, someone had gained a propriety exclusive of the common liberty of fishing in this part of the river, though the tide there flowed and reflowed.

I come now to the third and last phase of this litigation. It is alleged by the special defendants (and in a somewhat

different way by the Attorney-General) that whatever title, or colour of title, the plaintiffs have, it is modern in origin; that it is historically impossible that the Crown could have appropriated or put these waters in defence in the time of Henry II; that, therefore, the leases and grants by James and Charles, so far as they purport to create a several fishery, are invalid, and that the Court in the present case cannot make the presumption of lawful origin that was the basis of the decisions in *Malcomson* v. *O'Dea* (1) and *Neill* v. *Duke of Devonshire* (2)—and, indeed, in all the cases relating to tidal waters that have arisen in Ireland. In paragraph 21 of the special defendants' defence it is stated that "by the provisions of Magna Charta the Crown was prohibited from granting a several or sole and exclusive fishery in the *locus in quo* in case such was not existing therein in or before the year 1189, and any grant by the Crown contrary to the provisions aforesaid is null and void, and further that a several or sole and exclusive fishery in the *locus in quo* in or before the year 1189 did not in fact exist and is not historically possible, and the said documents of title and the historical evidence show that the claim to a several or sole and exclusive fishery in the *locus in quo* is modern in origin and dates at earliest from the times of Queen Elizabeth and James the First."

I am of opinion that this part of the defendants' case must rest upon the historical evidence that was adduced. I can see nothing in the plaintiffs' documents of title that supports the allegation that the claim to this fishery is modern in origin, and that it dates at the earliest from the times of these two monarchs. It was found by the inquisition at Assaroe that the hereditaments therein described belonged and appertained to the abbey, and particulars are given of lettings that had been made by "the late Abbot and convent." The fishery is described as belonging to the Abbot and convent "in right of their abbey or house aforesaid," and all these hereditaments are described as "the temporalities of the abbey aforesaid," which, as I have said, was founded in or about 1184. Then certain tithes and other rights are set out, which are described as "spiritualities of the abbey or house of monks aforesaid"; and it is stated that all these hereditaments "for a long time were unjustly concealed and detained from the said lady, the Queen, and her predecessors." There is certainly nothing in this record which suggests that the abbey's fishery rights had originated at some date after the time of Henry II. All the subsequent dealings with the abbey fishery are based, either expressly or by implication, upon the findings of this inquisition. It is hardly necessary for me to point out at this stage that, as was pointed out by Lord Plunket in the case of the *Irish Society* v. *Bishop of Derry and Another* (3), an inquisition of this sort does not

(1) 10 H. L. C. 593. (2) 8 A. C. 135.
(3) Printed by Alex. Thom, Dublin, 1840, at p. 11.

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give an original title; it is merely a finding that at the time the Crown had acquired title.

The inquisition at Rathmullan in 1603—six months after James had come to the throne—found that the fishery rights in the rivers of Donegal and Killybegs had come to the King "in right of his crown (by virtue of the statute [or statutes] in that behalf enacted)," and that the same "from the said lord the King for a long time are concealed and unjustly withheld." Similarly, the fisheries at Ballyshannon and Bundrois "belong and appertain to the said lord the King in right of his crown and from the said lord the King for a long time are concealed and unjustly withheld."

The lease to Binglie in 1603 is the first act of royal ownership of which we have any knowledge. It would appear that at the date of the lease Binglie was in actual possession of these fisheries, which are described as a "regality," and as "parcel of the King's Majesty's ancient inheritance." The hereditaments demised by the first lease to ffolliott, including the fisheries generally, are described as "belonging to us in right of our crown of England" and as "parcel of our ancient possessions in the said counties of Donegal, Fermanagh, Leitrim and Sligo."

There is nothing in these recitals and descriptions of parcels which in any way suggests how or when the fisheries came into existence as (what Willes J. calls) "a distinct and separate property," or that their origin was modern. They are described not merely as "flowers of the Crown," but as actual "ancient possessions" of the Crown; and the only inference that can be drawn from these recitals is that these fisheries came into the hands of the Crown as a result of the statutory forfeiture of the property of the original owners, or by reason of the confiscation of monastic property.

However, the provisions of the grant to Gofton in 1608 indicate very clearly that the draftsman of those documents had no intention of suggesting the date when, or the method by which, the right to the fisheries originated, or of sketching out an abstract of title. This document states that the hereditaments were granted in as full and ample a manner as they had come, or ought to have come, to the King or his ancestors "by reason or pretext of any exchange or purchase, or of any gift or grant or confirmation, or by reason of any attainder or forfeiture, or by reason or pretext of any Act or Acts of Parliament or by reason of escheat or in right of our crown or of our ancient inheritance or of any other lawful manner, right or title." The comprehensive grant to ffolliott in 1622, which included not only the abbey fishery, but "the whole fishing," concludes with this very same clause, intended to be indicative of the beginning of the Crown's title, but of nothing more. It is true that (as was said of the documentary title in *Neill* v.

Duke of Devonshire (1) none of these documents describes the Ballyshannon waters as having been "put in defence"; but certainly they afford no ground for saying that these waters had not been put in defence at a period at which the law permitted a several fishery rightfully to originate; and they seem to me to give persuasive indications that in ancient times there had been a large and fairly well-defined appropriation of the tidal waters in question, and an exclusion of the public from the enjoyment of the right of fishing.

This strange circumstance is not unworthy of notice: that during the course of the nineteenth century, when the right of fishing in tidal waters was litigated on dozens of occasions in the Irish Courts, this question, which is of such obvious historic and legal importance, was never raised and decided. I am deeply impressed by the heavy responsibility that rests upon me of deciding as between the public of the Irish Free State—because, of course, the people of Cork and Kerry have just as much interest in this question as the fishermen of Donegal, although, according to the defendants, the former could have had no such interest in 1189—who base their claim upon one of the most ancient principles of the common law of Ireland—a principle that is as necessary for the welfare of the community as it is reasonable in itself—and the plaintiffs, who, and whose predecessors, have been in the occupation and enjoyment of this fishery for three centuries and a quarter. If the defendants establish the proposition that the appropriation of these waters for the purpose of a several fishery, or anything in the nature of a several fishery, was historically impossible, then all the documents that the plaintiffs have treasured so carefully are waste paper, and the hundreds of years of fishing to the exclusion of the public that they have succeeded in carrying on represents but a long period of spoliation that, of course, no length of time could justify.

The defendants cannot admit that the terms of the inquisition of Assaroe represented anything in the nature of a several fishery, or a free fishery carved out of a several fishery. Indeed, they cannot admit that the abbey's privileges amounted to a proprietary right of any kind; because, if the monks were in the enjoyment of any form of right of fishing in these waters, it must of necessity have been conferred upon them by someone who had power to do so; and the existence of such a right would seem to be incompatible with the theory that the fishing at Ballyshannon had never been put in defence. As a consequence of this difficulty the defendants have been forced to advance, with a certain amount of diffidence, the extraordinary theory that the monks when they came to Assaroe were strangers or outlanders, and that these apparent privileges that they were supposed to have enjoyed represented a cutting down of the

(1) 8 A. C., at p. 159.

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general right of fishing, to which otherwise they would have been entitled as members of the public. But even this theory, if it were established, is not enough—because the cutting down of the right is just as incompatible with the general right of the public to fish as is the conferring of rights. If it is established that there was a hidden hand—hidden in the mists of the past—whether it was the hand of the Crown, or of an Irish prince, or of a defined section of the people of the neighbourhood, or a combination of these, with power to confer proprietary rights over these tidal waters in conjunction with corporeal rights over the surrounding lands that the monks had unquestionably acquired, then the whole assumption that these waters had not been put in defence must necessarily disappear.

But the whole course of subsequent dealing with the abbey fishery is contrary to the construction which the defendants seek to place upon the inquisition. In the subsequent leases, grants, and inquisitions, which may be regarded as a sort of *contemporanea expositio*, the fishery, including the weirs in the inland waters and the salmon and herring fishery in the tidal waters, was treated as property which might be the subject of a demise or a grant, with rent payable in respect thereof. Even the provision as to the "second draught of all the fishers at the Assaroe," does not, when it is examined, afford evidence of "a right of fishing in the inhabitants generally." This particular privilege—and it must be remembered that it is only one of a number—suggests some kind of a controlling person or power that had authority to place this burden upon the shoulders of "the fishers," and to enforce the right.

The situation here is not unlike that which was sought to be established in *Neill* v. *Duke of Devonshire* (1), in which case Mr. Justice Lawson, when charging the jury, said:—"Is it possible—can the wildest imagination suggest—that a public fishery could exist in a place one half of which is a several fishery? Is it possible to have a public fishery *ad medium filum* in one half with a several fishery in the other half?" It was held by Monahan C.J., in *Little* v. *Wingfield* (2), that the owner of a several fishery in tidal waters might grant to another "the right of taking fish (not an exclusive one) in a portion of the river and thereby create a free fishery" (p. 288); and Greene B., in the Exchequer Chamber, points out the same possibility (11 I.C.L.R., at p. 84). Having said so much about the abbey fishery, it is not necessary to analyse closely the evidence that was given on behalf of the plaintiffs as to the generous way in which the Irish monastic institutions were endowed in the early Middle Ages. Some interesting historical evidence was given as to the temporalities, particularly in regard to fishing rights, of various abbeys in Tyrconnell, Down, Wexford, and elsewhere.

(1) 8 A. C. 135, at p. 192.

(2) 8 I.C.L.R. 279.

There is a good deal of force in the objection that was taken by the defendants to this evidence, except perhaps that in reference to Tyrconnell. In any event, however, I think I could take judicial notice of the prevalence of this privilege as a matter of ecclesiastical history. Hale (Stuart A. Moore's "Foreshore," ed. 1888, p. 385) speaks of the numerous examples in ancient times of religious houses owning fishery rights in gross in navigable rivers and arms of the sea; and it will be found that in many, if not most, of the Irish cases fishery rights anciently owned by religious houses and ecclesiastical persons were the beginnings of several fisheries in tidal waters in modern times. There is a very instructive passage at p. 181 in the judgment of Lord Blackburn in *Neill* v. *Duke of Devonshire* (1), where he discusses as a matter of antiquarian speculation the probable course of development of these ecclesiastical fisheries; and Messrs. Pollock and Maitland, in their History of English Law, ed. 1898, vol. 1, p. 242, add their testimony to the history of the growth of the temporalities of the monastic bodies.

The defendants allege that it was historically impossible that the Crown could have acquired, whether through the exercise of the prerogative or by any other means, a several fishery in the *locus in quo* prior to the time of Richard I. The determination of this proposition would necessitate a very careful scrutiny of many constitutional and political events that occurred in this country between 1172 and 1189, as well as the consideration of many legal possibilities, which I do not intend to engage in at this stage. It seems to me that behind that difficulty there is a preliminary question that must first be faced, namely, the question of law, whether the putting in defence of fishing rights in tidal waters in the time prior to Richard I must have been some act of appropriation by the Crown, and by the Crown alone. The defendants have argued very strenuously, and perhaps particularly the Attorney-General, that, whether the several fishery was actually in the hands of the Crown at the time of the death of Henry II, or in the hands of an assignee or feudatory of the Crown, or even of an intruder, the original act of appropriation must have been effected by the Crown itself. I can find no ground whatsoever, whether in the terms of Chapter 16 itself, or the writings of ancient lawyers, or the judgments in modern cases, for such a proposition. If the phraseology of Chapter 16 is thought to have any trace of obscurity, Coke's comment upon it is certainly clear enough: "That is, that no owner of the banks of rivers shall so appropriate or keep the rivers several to him, to defend or bar others, either to have passage or fish there, otherwise than they were used in the reign of King H. 2." The passage quoted at p. 651 by Lord Blackburn in *Goodman* v. *Mayor of Saltash* (2)

(1) 8 A. C. 135.

(2) 7 A. C. 633.

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from Lord Hale's *De Jure Maris*, 2nd Inst. (ed. 1681), p. 30, is to the same effect.

The point that a several fishery may have an origin other than through an appropriation by the Crown was first mooted by Lord Chancellor Brady in *Allen* v. *Donnelly* (1), who thought it "highly probable that rights of this kind may have been enjoyed by the native princes." This is a rather remarkable case, inasmuch as it was concerned with an alleged several fishery on the north-eastern shores of Tyrconnell, in Lough Foyle, and the right was established in three separate actions. The last trial took place before Baron Pennefather and a special jury at Omagh, in March, 1856, on an issue which was directed by the Lord Chancellor. A report of the trial at Omagh was tendered by the plaintiffs in evidence, but I ruled against it, as I did not consider it to be sufficiently authenticated. However, the subsequent proceedings before the Lord Chancellor are reported in 5 I. Ch. R., at p. 452, when a new trial was asked for by the defendants on the ground, amongst others, that the Judge "should have told the jury that the inquisition of the 45th Elizabeth, coupled with the evidence of possession, was not sufficient evidence of such a title in the Crown as would enable it to make a grant of a several fishery to the said [Irish] Society." Mr. Francis A. Fitzgerald (afterwards Baron Fitzgerald), who appeared for the defendants, appears to have argued that "it must be proved first that the Crown had a right to make the grant." The Lord Chancellor held that the inquisition of Elizabeth, with another of James I, coupled with the evidence of possession, "form altogether overwhelming evidence that the crown was seized of the fishings of Lough Foyle for its whole length and breadth."

Mr Justice Willes, who delivered the unanimous opinion of the Judges in the House of Lords in *Malcomson* v. *O'Dea* (2), makes it very clear that an appropriation by anyone, and not alone by the Crown, previously to Richard I would be sufficient. It is true that, at page 618, he says: "The soil of 'navigable tidal rivers' like the Shannon, so far as the tide flows and reflows is *prima facie* in the Crown, and the right of fishery *prima facie* in the public. But for Magna Charta the Crown could by its prerogative exclude the public from such *prima facie* right, and grant the exclusive right of fishing to a private individual." The careful use of the words "*prima facie*," however, by this great Judge shows the implications that are involved. Later in his judgment, in an oft-quoted passage, which I certainly cannot decline to recognise as a correct statement of the law, he says:—"There is no improbability in the early appropriation of this always valuable property, or even a more extensive fishery, either in the time of the Irish princes, or in that of the Ostmen, who in this and other ports displaced

(1) 5 I. Ch. R. 229, at pp. 233, 234. (2) 10 H. L. C. 593.

the ancient inhabitants, and who no doubt gave the name of Lax Wear (Leax Waer or Lachs Wehr) to the chief accessory of the fishery, or by Henry II, in his grant to the companion of Strongbow. There is nothing improbable in its having been granted over in later times to the ancient and loyal city of Limerick.'' It is to be regretted that the judgment of Baron Fitzgerald, who dissented in the Exchequer Chamber, and who was upheld by the House of Lords, has not been reported. Of that judgment Willes J. said: ''We express our concurrence in the masterly judgment of Mr. Baron Fitzgerald, a performance which we cannot hope to improve upon''; and Lord Westbury agreed.

I think it is unnecessary for me now to trace through the report of *Neill* v. *Duke of Devonshire* (1) the various passages in the judgments in that case which confirm the view expressed by Willes J. Lord O'Hagan puts the matter very aptly, at p. 158, where he says that if a several fishery was ''previously appropriated either by the Crown or a private person, or, in technical language, 'put in defence,' there may be an effectual grant of it''; and I may refer to a similarly clear statement of the law by Lord Blackburn, at pp. 179 and 181. The law as laid down in these two cases has been followed and adopted in Courts of law both in England and Ireland on many occasions since then. Perhaps the latest was the decision of the Supreme Court in this country in the mandamus proceedings (2), when the Chief Justice of the Irish Free State quoted with approval some of the passages to which I have referred.

If that is the law, as I am satisfied it is, and if there is sufficient evidence of title, and of actual enjoyment, to enable me to presume that this fishery originated beyond the time of legal memory, as I think there is, then it seems to me that the defence filed by the Attorney-General is completely disposed of. The defence filed by, and the evidence given on behalf of, the special defendants carry the matter somewhat farther. They have pleaded that ''a several or sole and exclusive fishery in the *locus in quo* in or before the year 1189 did not in fact exist and is not historically possible.'' I am inclined to think that this plea, according to the intention of the learned counsel who drafted it, meant no more than an allegation that the feudal system had not penetrated as far as Ballyshannon in 1189; that, therefore, the King could not have appropriated a several fishery there at that early date; and that, as a consequence, the presumption of law that may be made from an ancient title and long-continued user is not historically possible. But if it is the law that an appropriation by anybody prior to 1189 is sufficient, then the special defendants must undertake, I do not like to say an impossible, but at any rate an extremely difficult, task. They must prove that no Irish prince, no private person,

(1) 8 A.C. 135.

(2) [1927] I.R. 406.

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no body of local inhabitants, and no corporate body ever appropriated a several fishery in this place previously to 1189; because, as the Chief Justice said in the mandamus proceedings (p. 427), "while we may take judicial notice of general history, we cannot without evidence have judicial knowledge of, or reach any conclusion as to, the fishery of the particular place in question here." Now the defendants, like the plaintiffs, can give no actual evidence as to the state of affairs at Ballyshannon in 1189. The curtain is lifted only to a very slight extent, enabling one to get a peep at the quiet abbey which was there at that time and the monks of St. Bernard, who were living their lives of piety and usefulness. No evidence was given, or, indeed, could be given, as to anything more. The learned evidence of Professor MacNeill and Professor Binchy dealt only with general matters of history, social customs, and customary law in Ireland, and I am bound to say now that, so far as the general tendency of that evidence is concerned, it assists the plaintiffs more than it does the defendants.

Professor MacNeill, as might have been expected, gave a large body of testimony of the greatest possible historic interest and value; but, from the point of view of the issues involved in this action, it is more remarkable for what it does not contain than for what it does contain. It shows with great clearness that sovereignty in Ireland at that time was very divided, and that it resided in the King of the Tuath, or rather, in the King and the freemen of the Tuath, the Tuath corresponding roughly with what is now known as the Barony. There was, therefore, no basis for any principle of law corresponding to that which existed in England, and which probably had existed since the disappearance of the Heptarchy, namely, that the right of fishing in tidal waters was common to all the inhabitants of the kingdom. Professor MacNeill is not able to say whether or not the distinction between tidal and non-tidal waters was known in ancient Irish polity, nor whether a tidal river such as the Erne was subject to the same juristic characteristics as the open sea; and he is not able to point to any definite statement in the Brehon Laws that all the inhabitants of the Tuath were equally entitled to fish in tidal waters. The only passage to which he refers on this point is to be found at p. 483 of vol. 5 of the Brehon Laws, and, as I shall show, it means something very different from the meaning which Professor MacNeill seeks to attach to it.

But whatever may be the effect of his evidence as to fishery rights enjoyed by that small portion of the Irish public of which the Tuath consisted, his evidence as to the methods by which property changed hands and was acquired is quite clear. A king could dispose of his own private estate, but not of mensal lands; and I gather from his evidence that the latter class of property, as well as such rights as we now call public rights,

could be disposed of by the freeholders of the Tuath or by the King and the freeholders jointly. He is clear that such rights were frequently acquired by monastic bodies and ecclesiastical persons, and when regranted by such bodies and persons the transaction was, as I have been told, usually evidenced by writing. The learned professor did not deal very fully in his evidence with another method by which property was acquired in ancient times, namely, by the use and enjoyment of the property—it might be the unlawful use of it—legalised after a long time by prescription. The following passage from his evidence throws some light on that subject:—

"Under the Brehon Laws grants were made by Kings to abbeys and monasteries? A considerable number.

"Were these valid? So far as they were grants of ownership purporting to come from the King alone, they were not valid. If the actual owners, the freeholders of those lands, concurred in the grant, then they were valid.

"So with the concurrence of freeholders, it was all right? Yes.

"So the freeholders had something to say to it? Yes, they must have.

"Do you say that the freeholders had nothing to say to these grants to the abbeys from time to time? I don't suggest it.

"Do you know whether they agreed or not? No.

"Don't you know that the abbeys or monasteries that got these grants remained in possession of them for ages and ages? Yes.

"And no one raised the point that the grant was void? The presumption was that if the grant was acted on, there was no disagreement."

Professor Binchy's very clear and scholarly evidence does throw very considerable light on the question as to the rights of the Crown and the progress of feudal law throughout Ireland during the four centuries following the year 1200; but I cannot say that it assists the defendants to any extent as regards the particular issue as to private rights that is before me at the moment. In proving a matter of this kind the persons who represent the public are confronted by precisely the same difficulty as that which was pointed out by Lord O'Hagan, where he said that proof of a matter or a fact alleged to be existing at such a remote period as 1189 by either documentary or parol evidence "cannot be obtained, although there may be plausible antiquarian speculation about it." It was this difficulty of proof to which obviously Lord Haldane was alluding in the *Canadian Case* (1), when he said, in reference to British Columbia:—"No rights there existing could possibly date from before Magna Charta." In the present case there is no definite evidence as to the state of the law at that time, and there is,

(1) [1914] A. C. 153.

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of course, no evidence at all as to what had happened, or was happening in fact.

The first passage in the Brehon Laws to which I have been referred is to be found in that portion of the first volume that deals with the ancient law of distress. Distress, or self-help, was the universal method by which in early times civil rights, whether contractual or arising out of wrongs, were enforced, and the regulation of the forms by which distresses were made and the delimitation of the right was a matter which required much attention and consideration. A treatise on distress, therefore, is the nearest approach to a modern book on practice and procedure that is possible.

After dealing with distress of one day and distress of two days, the original text of this treatise provides for distress of three days for various offences and wrongs, including those "for cutting thy wood, for breaking thy land, for injury caused by thy fence, for injury caused by thy ploughed [land], for thy weir, for infringing thy privilege," and so on.

The treatise, after dealing with distresses of various periods with a stay (of one day, of two days, of three days, and so on), proceeds to enumerate the cases of distress of ten days, and they include such matters as "for the partition of lands, . . . for things [of value] seen in the sea, for valuable articles, for digging a churchyard, for breaking bones, for damming a stream." This provision is found in what appears to be the original text of the Seanchus Mor. The following is the gloss upon the reference to the damming of a stream:—"For damming a stream, i.e., a dam at the head of the stream, i.e., to add one dam to another more than his share." Then comes this commentary, at p. 205, written presumably at a later date: "If a man has dammed the head of the stream more than one-sixth on each side of the river, if he owns [the lands lying on] both sides of it, or more than one-third on one side, if he owns but one side, two-thirds of the excess of the fish [taken] to be given by him to the owners of the other weirs up or down whichever way the fish pass. This is by way of 'smacht'-fine, and it has a stay of three days, and not having the wealth of his rank extends it to five days, and denial to ten days."

It seems to be assumed by the commentator that the wrong occasioned by the damming of a stream, as set out in the original text, refers to the use, or, rather, the abuse, of fishing weirs. At any rate we know now that, at the time when the commentary was written, fishing weirs on the banks of rivers, in the hands of the riparian owners, was a recognised class of property known to the law, and the existence of such weirs has always been recognised as evidence of the right of fishery at the place. With reference to that point, I need do no more than refer to the judgment of Willes J. in *Malcomson* v. *O'Dea* (1), at p. 620. In *Neill* v. *Duke of Devonshire* (2) Lord Selborne

(1) 10 H. L. C. 593. (2) 8 A. C. 135.

said that weirs "were the means usual in ancient times for appropriating and enjoying several fisheries in tidal waters." There is no evidence that in ancient Irish polity the distinction between the right of fishing in non-tidal and that of fishing in tidal rivers was known to the law, and I have no reason to think that the above passage would not have been applicable in the case of rivers of the latter class. The provision therein as to the giving up of the excess of fish in the event of a breach of what I may call the fishery regulations of the river was clearly one not in the interest of the public generally, but one in the interest of other owners of weirs, higher up or lower down.

The second extract, upon which Professor MacNeill and Professor Binchy have built a very interesting superstructure of speculation, is from a law tract in volume five. The translation of the title is given as "Of the Confirmation of Right and Law." A striking feature of this tract is the frequent references therein to the Church and Holy Men, as well as to the Scriptures and "the law of nature." The tract is essentially didactic in character, and seems to partake more of the character of ethical or moral instruction than of jurisprudence. At page 477 there is a reference to the plundering of lawful weirs, the word "plunder" being glossed (at probably a much later date) as meaning "to pillage it stealthily."

As regards the passage to which my attention has been directed, it is, I think, quite impossible to arrive at its true construction by doing as the witnesses have done—by taking a few sentences from the context which seem to support a preconceived thesis, leaving the rest of the passage out of consideration. The passage as translated is as follows:—

"How many things have been established as the inherent rights of every territory and which are equally due to every person? The salmon of every place; wild garlic; the 'andach' property of each water; the quick drawing [of a net] from each stream; the sufficiency for a night of faggots of each wood which has not the tripartite division of [trees]; cooking fuel in each wood; the mast [nuts] of each wood; materials for each carriage; timber for body-bearers; a handle for the champion's spear; a hand-stick for the horse-boy; twigs for three spancels; materials for hoops; materials for a churn-dash; the wild animals of each wood, through which there is a passage with necessity; the sea-wrack of each strand; the salt-leaf of each rock; the produce of each wave outside the rock; each wood which is without triple divisions; grinding upon the whet-stone; an acknowledged fair-green; going into a boat; playing chess in the house of a chieftain; salt in the house of a 'brewy'; the mountain which overtops all; a chain upon a captive, there being a space between him and the fetter."

In justice to the witnesses, it is necessary to say that no very

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definite statement was made as to the conclusions that were to be drawn from this passage. I fear that I cannot accept it as evidence, of even a shadowy character, that no right of fishing of an exclusive character in tidal rivers was in existence in the territory of Tirhugh in 1189. I myself am not sure that the whole passage is a proposition of positive law at all, much less a proposition of positive law recognised and accepted in the territory of Tirhugh in the twelfth century. If the references to salmon and fishing are to have such an implication as has been suggested, I fear to attempt to envisage the sweeping and far-reaching implications that are involved in the references to woods, wild animals, timber (including the beech tree), the champion's spear, sea-wrack, fair-greens, boats, and chess in the houses of chieftains. I think, as a matter of fact, that the whole passage is an attempt to lay down regulations of an eleemosynary or charitable character — something in the nature of poor-law relief, with a curious admixture of social and domestic precepts. It is difficult to see how it can be regarded as a statement of proprietorial rights, whether of a corporeal or incorporeal character.

But, even if by any method of reasoning this passage can be held to bear the meaning which Professor MacNeill places upon it, it must be remembered that it is a statement of a condition of affairs which existed five or six hundred years at least before the period that is in question here, namely, the end of the twelfth century, and possibly at even a much earlier date; and the glosses and commentaries which were added to the text at a later, probably a much later, date suggest the existence at that later date of a very different condition of affairs.

The following gloss, which will be found at page 485 of volume five, is not consistent with Professor MacNeill's theory:

"How many, i.e., how many or how numerous are the innate rights that have been established or ordained for the territory, and which are equally due to those within and to every kind of person outside the territory? The salmon of each place, i.e., of whatever place, i.e., the salmon which is in the place, it is lawful to give it one thrust. Wild garlic, i.e., which is not appropriated. The quick drawing, i.e., one pull at the net is lawful. Sufficient for a night, i.e., as much of the withered branches as is sufficient for a night, i.e., in an appropriated wood."

It is quite clear to me that the commentator here was setting out the eleemosynary privileges which all persons, whether natives or strangers, ought to have in respect of appropriated property. Of course, the extent to which such privileges were observed in the territory of Tirhugh is another matter.

I am of the opinion that there is nothing in the evidence which has been adduced on behalf of the defendants, or in any of the legal considerations that their counsel have advanced,

which is sufficient to displace the presumption of a lawful origin, or which would enable me to come to the conclusion that this fishery was of modern origin.

The plaintiffs, however, say that, even if there is a defect in their title, that defect was remedied by the legislation which was passed in the reign of Charles I, to remedy the supposed defective titles of those who acquired estates in Ulster about that time. That legislation was not specially pleaded by the plaintiffs, and I am not sure that it was necessary to have done so. However, to place the matter beyond doubt, I gave the plaintiffs and the defendants liberty to amend their statement of claim and defence respectively, and both parties availed themselves of that liberty. The first of these statutes is an Act of 10 Charles I, c. 3, passed in 1634, and entitled: "An Act for confirming of letters patent hereafter to be passed upon His Majesties commission of grace for the remedy of defective titles." It is not pretended that this Act assists the plaintiffs as against the special defendants, as it does not purport to do any more than confirm in anticipation such letters patent as may be granted in the future as against His Majesty, his heirs, and successors. A very interesting question arises, whether the Act is not binding upon the Attorney-General, as representing the Government of the Irish Free State. That Act was amended and explained by another Act of the same Parliament (10 Chas. I, sess. 3, c. 2), which stated that both Acts were to be "expounded and construed most strong against his Majesty, his heirs and successors, and most liberally and beneficially . . . for the best advantage, benefit and avail of such grantees or patentees, their heirs, successors, executors, administrators or assigns respectively." The third Act (10 Chas. I, sess. 3, c. 3) was expressed to be for securing the estates of the undertakers, servitors, natives, and others holding lands in the plantations made by Queen Elizabeth, James I, and Charles in a large number of counties, including Donegal and Fermanagh. Letters patent to be granted at any time within five years from the end of the Parliament of 10 Charles I (it came to an end in March, 1635) by virtue of any commission of grace then in existence or afterwards to be issued were confirmed and declared to be of full force and effect "as well against your Most Excellent Majesty, your heirs and successors, as against all and every other person and persons whatsoever." One of the defects which this legislation was intended to remedy was "the lack or omission of sufficient and special *non obstantes* of particular statutes, whereby the said letters patent or grants may be impeached."

The matter was again the subject of legislation in 1639 (15 Chas. I, c. 6), which refers to various former commissions of grace for defective titles which had been issued by the King, and recites a "latter commission of grace bearing

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date at Canterbury in the realm of England the first day of September in the fourteenth year of his said Majesties reign.'' It then recites that there were certain lands and hereditaments ''which are not yet past upon any of the said commissions of grace,'' but which ''may hereafter be past either upon the now commission of grace [i.e., of September 1st, 1638] or upon some other like commission or commissions''; and it enacts that all letters patent ''of any castles, honors, mannors, towns, villages, hamlets, lands, tenements, franchises, liberties, immunities or other hereditaments, spirituall and temporall,'' by virtue of any commission of grace, granted or to be granted to any person, ''shall be by authority of this present Parliament enacted, and to be and shall be deemed and adjudged to be good, effectual, and indefeasible to all intents, constructions and purposes in manner following.'' That enactment is perfectly general in its character, and is sufficient in itself, I think, to ratify and confirm the letters patent to which it applies; but, to make the matter doubly plain, certain possible defects in the titles of these patentees are mentioned, and they include ''any statute, ordinance, law, cause, matter or thing which might or may any way impeach, infeeble, avoid or destroy any of the said letters patent in all or in any point or points whatsoever.'' These grants were confirmed not only as against His Majesty, his heirs, and successors, but also ''as against all and every other person, or persons, bodies politick and incorporate, spiritual and temporal, whatsoever.'' And—to heap Ossa upon Pelion, as it were—it is further enacted that the King is deemed and adjudged to be ''in the actual and real seisin and possession of a good, lawful, indefeasible and absolute estate'' in the hereditaments in the several counties, including Donegal and Fermanagh, as had been, or shall be, granted by virtue of any such commission of grace.

It is, in my judgment, entirely futile for the defendants to attempt to show that the grant of lands and fisheries made to Thomas ffolliott on August 30th, 1639, did not come within the scope of this legislation, both in the letter and in the spirit. It is a grant of lands in two of the specified plantation counties to a man whose father—Sir Henry ffolliott—is described in the commission or letter of the King to the Lord Deputy, dated October 22nd, 1618, as a ''servitor,'' a commission which was duly enrolled in the Irish Chancery on October 20th, 1620, and was duly followed by the letters patent of April 9th, 1622—the first grant that was made to the ffolliotts. The grant of 1639 is expressed to be made by virtue of the very commission of grace which is recited in the Act of 15 Charles I, and almost in the very words of the Act: ''Our commission under our great Seal of England bearing date at Canterbury in our said kingdom of England on the first day of September in the fourteenth year of our reign.'' It is plain that that commission had been

specially promulgated as an authorisation to carry out a settlement by means of letters patent to be confirmed by an Act of the Irish Parliament. The Commissioners were empowered to make such composition with the Irish patentees as might be desirable. A promise was made that every such grant as might be made by virtue of the commission should be confirmed by an Act of Parliament at the next Parliament to be held in Ireland, and the Judges were directed, when they were required to do so, to assist and attend upon the Commissioners when they were carrying out their work.

The grant of 1639, as I have pointed out, is expressed to have been made by virtue of this commission, and, following closely the lines of that document, it recites the fact that Thomas had made composition with the Commissioners by the payment of a sum of £99 7s. 6d. The grant does not profess to be one confirming the previous grant to Henry; nor is it made to Thomas as heir-at-law of Henry. It is an absolutely new grant to Thomas, without any regard for anything that had gone before, and Thomas himself becomes a patentee of the Crown, without any reference to his relationship to Henry. He is bound to perform certain military services for the Crown, and to maintain and keep fortified the castle at Ballyshannon, which was one of the hereditaments assured to him. Further, for a consideration that is carefully set out, he is specially released from the actual conditions of the Plantation, the King agreeing expressly to indemnify him against the non-performance of the "articles of plantation" and in respect of all bonds and the like "for the performance of the plantation," and to release him from the Crown's right of re-entry by reason of the non-performance of any condition "for the plantation." This elaborate machinery for the safeguarding of ffolliott was entirely unnecessary if this was not a plantation grant. In my opinion, the letters patent say, as plainly as anything can be said: "This is a plantation grant, but you, the grantee, are specially released from the performance of the plantation conditions, except such as are expressly reserved, and you will be indemnified in respect of the non-performance of all such conditions."

The Act of 15 Charles I then provides that its confirmatory force shall apply to "all and every letters patent which are already past or hereafter shall be past under the great seal of this kingdom of Ireland of any castles, honors, mannors, towns, villages, hamlets, lands, tenements, franchises, liberties, immunities or other hereditaments, spiritual or temporal . . . by virtue or pretence of, or reference unto any commission of grace now in being or hereafter to be within this kingdom . . . lying or being within every or any of the late plantations within this kingdom," made by Queen Elizabeth, James I, or Charles I. It seems to me that in the way that I have indicated the commission of grace of September 1st, 1638, the letters patent of

Johnston J. 1639 and the Act of 15 Charles I are inextricably bound up together.

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In my opinion Thomas ffolliott acquired, possibly by virtue of the Act, 10 Charles I, sess. 3, c. 3, certainly by virtue of the Act, 15 Charles I, c. 6, an indefeasible parliamentary title which cannot now be impeached either by the Government or the public of the Irish Free State.

The defendants have relied very strongly on the fact that the ffolliott grant and lands are not set out in Pynnar's Survey (Hill's Plantation of Ulster, 1877, p. 449). As to that matter, it must be recollected that Pynnar's Mandate was not one to take a census of the Ulster planters and their lands, but merely one to report to the Government to what extent the planters had observed the terms and conditions of the plantation. Further, the survey was made between December, 1618, and March, 1619, before either of the grants had been made to the ffolliotts.

There is the further argument that, even if the grant of 1639 comes within the purview of the Act of Charles I, the *non obstante* clause therein is not effectual to avoid the consequences of such an important statute as Magna Charta without an express reference to that legislation. Although this point was not very fully argued, I am satisfied that there is no rule of construction which would sanction a discrimination of the kind in regard to such very general words as those used in the Act. It was held in *Delacherois* v. *Delacherois* (1) by the five Judges who were called in to advise the House of Lords, and so stated by Willes J. in a passage dealing with this very legislation, that these words were effectual to avoid the operation of such important legislation as the statutes of *Quia Emptores* and *De Prerogativa Regis*. In any event, however, the provisions of the Act of Charles are far-reaching enough to give statutory authority to the grant of 1639 without the aid of any *non obstante* clause at all.

I regret very much that this judgment has proved to be so very lengthy; but in view of the very important issues of law and fact that were raised in the course of a hearing which lasted for twenty days, and in justice to the parties and the eminent counsel who represented them, I have found it impossible to shorten it. There are a few other matters that were discussed during the hearing to which I have not alluded; but I hope that the parties will accept my assurance that I have considered all the arguments to the best of my ability, and I think that my views as to most, if not all, of them will be found implicit in my general conclusions.

I may say in conclusion that I fully recognise and appreciate not only the enthusiasm, but also the sincerity, that actuates the defendants and those who are assisting them; but the responsibility rests with me, and I must remember that ancient land-

(1) 11 H.L.C. 62.

marks cannot lightly be removed. That is a proposition that goes far behind Magna Charta. So far as the evidence goes, no effective claim to this fishery was ever made on behalf of the public till 1925, and the case that the defendants make now is no more than what Lord O'Hagan called "plausible antiquarian speculation," which has been placed before me by advocacy of the highest order. On the other hand, the plaintiffs and their predecessors, as I am satisfied, have been in exclusive possession of this fishery for centuries, and their title originated under circumstances that cannot now be questioned. There must, therefore, be judgment for the plaintiffs in the terms of the prayer in the statement of claim.

Solicitor for the plaintiffs: *R. H. Reid.*
Solicitor for the Attorney-General: *The Chief State Solicitor.*
Solicitor for the defendants (other than the Attorney-General): *Francis Gallagher.*

R. R.